Docket for 02-1794

No. 02-1794	Status: ARGUED
Title:	United States, Petitioner v. Manuel Flores-Montano
Docketed:	June 11, 2003
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(02-50306)
Decision Date:	March 14, 2003

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 11 2003	Petition for writ of certiorari filed. (Response due July 11, 2003)
Jul 3 2003	Order extending time to file response to petition to and including August 11, 2003.
Jul 28 2003	Order further extending time to file response to petition to and including September 10, 2003.
Sep 10 2003	Motion for leave to proceed in forma pauperis filed by respondent Manuel Flores-Montano.
Sep 10 2003	Brief of respondent Manuel Flores-Montano in opposition filed.
Sep 24 2003	DISTRIBUTED for Conference of October 10, 2003.
Sep 26 2003	Reply of petitioner United States filed. (Distributed)
Oct 14 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 14 2003	Petition GRANTED.
Oct 22 2003	Motion to appoint counsel filed by respondent.
Nov 4 2003	Motion to dispense with printing the joint appendix filed by petitioner United States.
Nov 5 2003	Motion DISTRIBUTED for Conference of November 26, 2003.
Nov 17 2003	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 26 2003	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed.
Nov 28 2003	Brief of petitioner United States filed.
Dec 1 2003	Motion to appoint counsel filed by respondent GRANTED. Steven F. Hubachek, Esquire, of San Diego, California is appointed to serve as counsel for the respondent in this case.
Dec 10 2003	SET FOR ARGUMENT Wednesday February 25, 2004.
Dec 17 2003	CIRCULATED.
Dec 24 2003	Extension of time within which to file respondent's brief on the merits to and including January 12, 2004.
Jan 7 2004	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)
Jan 7 2004	Brief of respondent Manuel Flores-Montano filed. (Distributed)
Jan 12 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 15 2004	Record received from the U.S.D.C. for the Southern Dist. of California. (1 envelope)
Feb 11 2004	Reply of petitioner United States filed. (Distributed)
Feb 25 2004	Argued. For petitioner: Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Steven F. Hubachek, San Diego, Cal. (Appointed by this Court.)

Supreme Court, U.S.
FILED

02 1794 JUN 11 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The order of the district court (App., *infra*, 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

2. Section 1581(a), Title 19, U.S.C., provides:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

STATEMENT

1. On February 12, 2002, Customs Inspector Visente Garcia conducted an inspection of a 1987 Ford Taurus station wagon driven by respondent as he entered the Otay Mesa Port of Entry along the California border. As the inspector asked some questions, respondent avoided eye contact. Respondent's hand also was shaking as he handed the agent his passport. The inspector tapped on the vehicle's gas tank with a screwdriver and noticed that the tank sounded solid. The inspector was also informed that a dog had alerted to the vehicle.

Respondent was then removed from the vehicle, and the vehicle was driven to a secondary inspection station. At 4:20, Customs Inspector Jovita Pesayco at the secondary station inspected the gas tank by tapping it and observing a solid sound. He subsequently requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. That process took 10 to 15 minutes. After the gas tank was removed, Inspector Pesayco hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. That process took an additional 5 to 10 minutes. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. App., *infra*, 4a-5a (Declaration of Visente Garcia, senior border inspector for the United States Customs Service); *id.* at 7a-9a (Declaration of Jovito Pesayco, senior border inspector for the United States Customs Service).

On February 27, 2002, respondent was indicted on one count of unlawfully importing approximately 37 kilograms of marijuana, in violation of 21 U.S.C. 952, 960, and one count of possession of that marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Relying on *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), respondent moved to suppress the marijuana uncovered from the gas tank. In *Molina-Tarazon*, a divided panel of the Ninth Circuit held that the removal of the gas tank is a nonroutine border search that requires reasonable suspicion. *Id.* at 713-717. The court also held that, on the facts in that case,

the inspectors had reasonable suspicion to conduct the search. *Id.* at 717-718.[1]

In response to respondent's motion in this case to suppress evidence of the marijuana found during the gas tank search, the government advised the district court that it was not relying on reasonable suspicion as a basis for denying respondent's suppression motion, but that it believed that *Molina-Tarazon* was wrongly decided. The government contended that when a vehicle seeks to cross the border, 19 U.S.C. 1581(a) authorizes customs officers to "search the * * * vehicle and every part thereof," without any requirement of a warrant or particularized suspicion. The government also contended that "[t]his statute is coextensive with the Constitution." Gov't Response and Opp. to Def's Mot. to Suppress Evidence Based on Alleged Non-Routine Border Search 5 (filed June 17, 2002). The government's response also included as exhibits four affidavits concerning the procedure in this case and the need to conduct such procedures in other cases. App., *infra*, 4a-18a.

2. On June 19, 2002, the district court ordered the suppression of the drugs seized from respondent's gas tank. Relying on *Molina-Tarazon*, the court held that the search was nonroutine and therefore required reasonable suspicion. App., *infra*, 3a. The court further found that "the Government has waived its right to rely on the alternative basis of reasonable suspicion, and * * * that, in this case, the Government has declined to establish reasonable suspicion." *Ibid.* The district court also found "that the facts set forth in the Govern-

[1] The court of appeals' decision in *Molina-Tarazon* is *reprinted in* the Appendix, *infra*, 19a-36a.

ment's declarations and motion exhibits are the facts in this case." *Ibid.*

3. On July 26, 2002, the government petitioned for initial hearing en banc, requesting the court to reconsider its decision in *Molina-Tarazon*. On March 14, 2003, the court of appeals issued an order summarily affirming the district court's judgment on the basis of *Molina-Tarazon*.[2]

REASONS FOR GRANTING THE PETITION

"Border searches, * * * from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Essential to the government's ability to protect the Nation from the entry of drugs, weapons, explosives, and unauthorized persons and things is the power to conduct searches of containers crossing an international border. "The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." *Id.* at 620.

The Ninth Circuit has adopted a rule that is wholly at odds with the government's urgent interest in preventing the smuggling of contraband and persons across our borders. In the view of the Ninth Circuit, the disassembly of a gas tank of a vehicle to inspect it for contraband—even when there is no other practicable means of determining what the gas tank contains—violates the Fourth Amendment unless Customs officers possess reasonable suspicion that the gas tank

[2] The clerk's office advised the government that, on March 3, 2003, the court denied the government's petition for initial hearing en banc without a written order.

conceals contraband. The Ninth Circuit's approach invalidates, in part, Congress's authorization in 19 U.S.C. 1581(a) of suspicionless border searches of vehicles—a statutory provision whose antecedents reach back to the Nation's origins. The Ninth Circuit's holding also departs from this Court's Fourth Amendment analysis in border search cases, under which the minimal intrusion in the removal, disassembly, and reassembly of the gas tank makes its search routine and permissible without any quantum of particularized suspicion.

The court of appeals' holding deprives Customs officers of an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband. Gas tanks are commonly used to smuggle contraband and persons into this country. In recent years, seizures from gas tanks have accounted for 25% of all drug seizures along the Southern California border. The authority to search gas tanks without any level of suspicion is critical to the government's ability to deter and detect smuggling and is an issue of substantial and recurring practical significance to the protection of the United States and its citizens. This Court's review of the Ninth Circuit's unjustified restriction of that authority is therefore warranted.

A. The Ninth Circuit's Conclusion That A Gas Tank Search Requires Reasonable Suspicion Is Inconsistent With The Recognized Broad Power Of Customs Officials To Conduct Searches At The Border

This Court has made clear that the government has broad authority to conduct routine searches at the border without any level of particularized suspicion. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("[r]outine searches of the persons and effects of entrants [at the border] are not subject to any

requirement of reasonable suspicion, probable cause, or warrant"). The Court has also made clear, with respect to non-routine searches, that the appropriate Fourth Amendment rule depends on a balancing of the government's "longstanding concern for the protection of the integrity of the border" against the individual's limited privacy expectations at the border. *Id.* at 538-540. In *Montoya de Hernandez*, the Court held that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Id.* at 541. The Court also stated that it was "suggest[ing] no view on what level of suspicion, if any, is required for *nonroutine* border searches such as strip, body-cavity, or involuntary x-ray searches." *Id.* at 541 n.4 (emphasis added).

In *Molina-Tarazon*, the Ninth Circuit held that the removal and disassembly of a vehicle's fuel tank constitutes a "nonroutine" border search that requires reasonable suspicion. 279 F.3d at 713. That holding is fundamentally unsound. Under this Court's decision in *Montoya de Hernandez*, and in light of historical practice and the practical need for thorough searches of vehicles at the border, the search in this case was routine. In holding otherwise, the Ninth Circuit's analysis understated the government's interest and overstated the private interests at stake. And even if such a search were considered nonroutine within the meaning of *Montoya de Hernandez*, a suspicionless gas tank search is nonetheless reasonable under the Fourth Amendment, given the balance between the government's overriding need to protect the border and the modest intrusion on individual interests.

1. *Removal and disassembly of a vehicle's gas tank at the border is a routine search*

The scope of the government's power to conduct routine searches at the border without any level of suspicion is informed by the historical power of customs officials to conduct border searches, and the sovereign necessity to control unwanted persons and effects as they enter the Nation. The power of customs officials to conduct searches at the border has an "impressive historical pedigree." *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 585 (1983). "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, 473 U.S. at 537.

The gas tank search in this case was authorized by Section 1581(a), which states that custom officials "may at any time go on board of any vessel or vehicle * * * and examine, inspect, and search the vessel or vehicle *and every part thereof* * * * and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance." 19 U.S.C. 1581(a) (emphasis added). That statute derives from a statute passed by the First Congress, the Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 164, see *Villamonte-Marquez*, 462 U.S. at 584, which "authorized customs officers to board and search vessels bound to the United States and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in." *Maul* v. *United States*, 274 U.S. 501, 505 (1927). Section 31 of the 1790 Act permitted customs and revenue officers "to go on board of ships or vessels * * * for the purposes of * * * examining and searching the said

ships or vessels," and provided that the officers "shall have free access to the cabin, and every other part of a ship or vessel" to seal and mark containers and packages that were to remain on the ship. § 31, 1 Stat. 164. The Act also gave customs officials the power to place inspectors on board ships "to examine the cargo or contents" of ships entering the country, and authorized the seizure and forfeiture of goods upon violation of the Act. Act of Aug. 4, 1790, ch. 35, §§ 27, 28, 30, 50, 60, 70, 1 Stat. 163-164, 170, 174, 177. Because the 1790 Act was passed by the same Congress that proposed the Fourth Amendment, "it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." *Ramsey*, 431 U.S. at 617 (quoting *Boyd* v. *United States*, 116 U.S. 616, 623 (1886) (emphases removed)).[3]

Neither Section 1581(a) nor its lineal ancestor requires reasonable suspicion to search. Rather, the statutory authority of customs officials to search vehicles at the border is plenary and entitles officers to

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[3] In *Ramsey*, this Court observed that the earliest customs statute, Act of July 31, 1789, ch. 5, 1 Stat. 29, was passed two months before Congress proposed the Bill of Rights and contained an "acknowledgment of plenary customs power" to conduct warrantless inspections of vessels. *Ramsey*, 431 U.S. at 616. The 1789 Act granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed"; in contrast, searches of any "particular dwelling-house, store, building, or other place" were authorized with a warrant upon "cause to suspect" concealment of dutiable goods. § 24, 1 Stat. 43. That provision was carried forward in the Act of Aug. 4, 1790, ch. 35, §48, 1 Stat. 170, and is distinct from the separate authority of customs to conduct suspicionless searches of articles and effects when presented for entry at the border.

search, without suspicion, concealed and opaque compartments, where contraband may be secreted. The authority thus includes, for example, luggage, trunks, and glove compartments. "Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods much be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *United States* v. *Ross*, 456 U.S. 798, 820 (1982). Given those practical realities, "[d]uring virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Id.* at 820 n.26. The historical power to conduct a routine border search of a vehicle similarly extends to the vehicle's gas tank, a large and opaque container in which contraband may be stored.

The government's vital interest in "protect[ing] the Nation by stopping and examining persons entering this country" supports the conclusion that a gas tank search at border is routine. *Montoya-Hernandez*, 473 U.S. at 538. It requires no "extended demonstration" to prove "[t]hat searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Ramsey*, 431 U.S. at 616; accord *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973) ("It is also without doubt that [the power to exclude aliens] can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders."). The Court has long distinguished searches and seizures of vehicles

within this country, which require probable cause, from border searches, which do not. As explained in *Carroll* v. *United States*:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.*

267 U.S. 132, 153-154 (1925) (emphasis added).

"At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives." *Montoya de Hernandez*, 473 U.S. at 544; accord App., *infra*, 11a (Declaration of Jayson P. Ahern, Director, Field Operations, for the Southern California Customs Management Center) (The "primary mission at Customs is ensuring border security, working on anti-terrorism initiatives, and interdicting drugs, contraband, and dangerous materials, while maintaining the smooth flow of legitimate travel and trade.").

That analysis applies with particular force to gas tanks, which are large and commonly used containers for smuggling contraband and persons across the border. See pp. 17-18, *infra*. Removal and disassembly of the gas tank is a highly effective means to search for

contraband hidden within the tank. That process may be the only practicable alternative for the government to determine whether the gas tank has been modified or altered. *Molina-Tarazon*, 279 F.3d at 712 & nn.2-3 (noting the presence of manufacturer-installed anti-siphoning valve in gas tank that blocked the use of fiberoptic scope). The government accordingly must have wide latitude to remove and disassemble a vehicle's fuel tank to deter and detect illegal smuggling into this country. That need is "heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *Montoya de Hernandez*, 473 U.S. at 538. The government's interest also extends to the prevention of smuggling of aliens and of bombs, explosives, or other implements of terrorism that likewise may be concealed in gas tanks. Pp. 17-19, *infra*. Inspection of gas tanks therefore falls within the category of routine measures needed to conduct a thorough inspection of a vehicle seeking entry at the international border.

A search should be regarded as "nonroutine" only when its level of intrusiveness equals or exceeds the monitoring of a traveller's bowel movements involved in *Montoya de Hernandez*, 473 U.S. at 534-535, or the other nonroutine searches of the person identified in the Court's decision, *i.e.*, "strip, body-cavity, or involuntary x-ray searches," *id.* at 541 n.4. See, *e.g.*, *United States* v. *Nieves*, 609 F.2d 642, 645-646 (2d Cir. 1979) (holding that search of shoes that entailed removal of shoes and drilling two small holes through the soles was a routine search requiring no level of suspicion because search did not approximate a strip search), cert. denied, 444 U.S. 1085 (1980). Those searches of the person are far more intrusive than searches of a vessel or vehicle,

which have long been conducted without any particularized level of suspicion.

The removal, disassembly, and reassembly of a gas tank involves no extraordinary intrusion upon either the individual or his vehicle. The actual disassembly of respondent's gas tank in this case took only 5 to 10 minutes. App., *infra*, 8a. The procedure also involved no destruction of property and was reversible by reassembling the tank. As the inspector who performed the procedure in this case testified:

> At most, my hammering off the bondo slightly scratched and possibly slightly dented the gas tank, but the gas tank was just as workable as it was before I removed the bondo. The gas tank was not damaged as far as safety and workability were concerned. This did damage the bondo, but new bondo could easily have been applied. * * *
>
> The force used to lower the gas tank was not damaging. * * * Nothing was permanently altered and nothing was damaged. I have witnessed this procedure hundreds of times * * *. It was easy to disconnect the gas tank, and it would have been easy to connect it back again. The gas tank could have been reconnected without damaging it or the vehicle.

Ibid. Although the tank here was not reconnected upon discovery of the drugs, in cases where "no contraband is discovered, it is Customs' policy to reassemble and reinstall any gas tanks that are disassembled during a border search." *Id.* at 13a (Declaration of Jayson P. Ahern).

2. *The court of appeals' reasoning in concluding that a gas tank search is nonroutine is flawed*

In holding that the removal and disassembly of a fuel tank was nonroutine, *Molina-Tarazon* erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches. Rather, the court of appeals reasoned that "[t]hree aspects of the search here render it nonroutine: Force was used to remove and disassemble the fuel tank; the procedure involved some risk of harm; and someone whose vehicle was subjected to such a search is likely to feel a diminished sense of security." 279 F.3d at 713.

As to the first factor, the court noted that a gas tank search requires "the use of tools" and "the use of force" in the removal of the tank from the vehicle. 279 F.3d at 714. As to the second factor, the court expressed its view that "the procedure involved some risk of harm," because "[a]n error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner." *Id.* at 713, 715. As to the third factor, the court found the search "psychologically intrusive," because an individual subjected to such a search would experience fear or a "diminished sense of security" associated with driving a "potentially unsafe" motor vehicle reassembled by a mechanic not chosen by the individual. *Id.* at 713, 715, 716. The court's reliance on each of those factors was erroneous.

First, the only "[f]orce" involved in a gas tank search is the *non-destructive* removal and disassembly of the tank, and that procedure can easily be reversed upon completion of the search without any effect on the tank's safety or operation. P. 13, *supra*. Moreover, as

the Ninth Circuit recognized, the use of force is not "dispositive" in rendering a search nonroutine. *Molina-Tarazon*, 279 F.3d at 714. "For example, if the lock is jammed on a suitcase or its owner refuses to present a key, [customs] agents have to employ some degree of force to gain access to its interior." *Ibid.*; 19 U.S.C. 1461. *Second*, the court of appeals' perception of the safety risks of the procedure is entirely speculative. The court pointed to no reported instance of any mechanical error, much less an accident, associated with a gas tank search. Nor is Customs aware of any such instance. Gas tank searches, at least as a factual matter, are routine, occurring several hundred times a year in Southern California alone. P. 17, *infra*. Moreover, Customs informs us that such services are performed under contract by qualified mechanics who are employed as regular mechanics in Southern California by other employers. See App., *infra*, 7a (Declaration of Pesayco). *Third*, given the absence of any empirical basis for concluding that gas tank searches pose a danger to the driver of the vehicle or its passengers, any fear occasioned by being informed of a gas tank search would be unreasonable.

Accordingly, the rationale of the Ninth Circuit is unsupported factually and legally. The quick, safe, and nondestructive removal of a gas tank is not outside the routine sorts of inspections that international travelers should anticipate when seeking entry into this country.

3. *A suspicionless gas tank search is reasonable even if such a search is not regarded as routine*

Even assuming, *arguendo*, that *Molina-Tarazon* were correct in characterizing a gas tank search as nonroutine, the court of appeals' decision nonetheless erred in assuming that any "search that goes beyond the

routine" requires reasonable suspicion. 279 F.3d at 712. This Court in *Montoya de Hernandez* expressly stated that its holding that customs officials need reasonable suspicion to detain a traveler for monitoring her bowel movements was limited to the circumstances of that case; the Court accordingly "suggest[ed] no view on what level of suspicion, *if any*, is required for non-routine border searches such as strip, body-cavity, or involuntary x-ray searches." 473 U.S. at 541 n.4 (emphasis added). As the Court in *Montoya de Hernandez* explained, the essential inquiry is one of *reasonableness*, based on a balance of "the sovereign's interests at the border" against the rights of individuals who "present[] [themselves] at the border for admission." 473 U.S. at 539; see *Villamonte-Marquez*, 462 U.S. at 588-593 (conducting balancing test in upholding constitutionality of the suspicionless boarding of vessels by customs officials for document inspection).

Under such an inquiry, a suspicionless border search of a vehicle's gas tank that requires its removal and disassembly is reasonable. The Court has recognized that "not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck must more favorably to the Government at the border." *Montoya de Hernandez*, 473 U.S. at 539-540 (citations omitted). As discussed, a gas tank search imposes only a minimal intrusion on the individual whose vehicle is subject to the search at the border. Any interest of the individual in avoiding that intrusion is outweighed by the government's paramount interest in protecting its borders from unwanted items and effects that may be concealed in gas tanks—an interest not even considered by the court of appeals in *Molina-Tarazon*.

B. The Court of Appeals' Decision Threatens To Impair The Government's Ability To Protect The Border From The Unwanted Entry Of Persons And Things

1. The Ninth Circuit's imposition of a reasonable suspicion requirement to conduct gas tank searches at the border warrants this Court's review. Because 19 U.S.C. 1581(a) authorizes such searches without requiring reasonable suspicion, the court of appeals' decision effectively declares unconstitutional an important and long-standing application of the government's statutory authority to enforce the country's laws at the border.

The power to conduct suspicionless searches of gas tanks and other vehicular compartments is critical to the ability of customs officials to guard the country's border against smuggling. App., *infra*, 12a (Declaration of Jayson P. Ahern). Over the last five and one-half years, approximately 25% of all drug seizures at land border crossings in the Southern California area arose from attempts to smuggle drugs in a vehicle's gas tank. During that period, there were 4619 drug seizures from gas tanks in the Southern California area. *Ibid.* "Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles." *Ibid.*

Significantly, gas tanks represent a relatively sizeable compartment of a vehicle that criminals may modify or alter to smuggle not only large quantities of drugs, but also persons. As the Assistant Director for Inspectors for the San Diego District, Immigration and Naturalization Service, Diane Hinckley, has explained, "[i]nstances of persons smuggled in and around gas tank compartments are not uncommon at the ports of entry, averaging one approximately every ten days at [the] San Ysidro and Otay Mesa [ports of entry]." App., *infra*, 16a. Such smuggling poses significant health and

safety risks to the persons being smuggled. *Id.* at 16a-17a. "Because these cases occur regularly, inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." *Id.* at 16a.

2. By requiring reasonable suspicion to conduct searches of one of the most commonly used vehicular compartments for concealing smuggled items, the Ninth Circuit's decision in *Molina-Tarazon* threatens to impair the ability of the United States to deter, detect, and prevent the unlawful smuggling of unwarranted items across our borders. A requirement of reasonable suspicion would remove the significant deterrent effect of suspicionless searches and encourages criminals to use fuel tanks as a means of smuggling contraband. The power of customs officials to conduct random searches "is an important deterrent to smugglers using gas tanks and other compartments to smuggle contraband, because they would believe that gas tanks and other compartments, as with other areas in a vehicle, could be searched randomly and with no level of suspicion." App., *infra*, 12a-13a (Declaration of Jayson P. Ahern). The Ninth Circuit's decision poses a serious risk of affirmatively increasing the level of gas tank smuggling since would-be smugglers are likely to hide contraband in gas tanks rather than other compartments of the vehicle that are subject to inspection without any level of suspicion. That risk becomes even more serious when coupled with the decrease in the frequency of gas tank searches and seizures that would inevitably result from a requirement of reasonable suspicion:

> To require reasonable suspicion for an INS inspector to search a gas tank compartment area * * * will likely result in fewer gas tank compartment area[s] * * * searches, additional persons being successfully smuggled in gas tank compartment areas * * *, and more attempts to use gas tank compartment area * * * for alien smuggling. Smugglers detect weak points readily and exploit them. * * * Requiring reasonable suspicion to search gas tank compartment areas * * * could lead to gas tank compartments * * * becoming the preferred choice for alien smuggling in the Southern District of California.

Id. at 16a-17a (Declaration of Diane Hinckley). That analysis applies with equal force not only to the smuggling of narcotics, but also to the smuggling of other hazardous substances into the United States. Indeed, customs officials intercepted one would-be terrorist, Ahmed Ressam, who entered the country with a vehicle containing explosives hidden in the trunk. In what became known as the "Millennium Plot," Ressam intended to detonate the explosives at LAX airport as part of a terrorist attack. *United States* v. *Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002). The Ninth Circuit's decision creates an appreciable risk of encouraging terrorists to use gas tanks as a means to avoid the detection of explosives or other hazardous substances crossing the country's borders.[4]

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[4] Courts have long recognized that the imposition of a requirement of particularized suspicion on customs searches under 19 U.S.C. 1581(a) would open a significant loophole in the ability of federal agents to thwart smugglers. *United States* v. *146,157 Gallons of Alcohol*, 3 F. Supp. 450, 456 (D.N.J. 1933) (rejecting requirement of a warrant or probable cause, because if such restrictions on searches of American vessels existed, "it will mean that the smugglers * * * need only maintain an outward air of respectability and legality to escape discovery, and it will surround

Customs officials face a formidable task in protecting our borders from the smuggling of unlawful items and aliens in vehicles. In fiscal year 2002, more than 90 million vehicles carrying more than 250 million passengers entered the United States through the ports of entry along the Southwestern border. Customs & Border Protection, *Southwest Border Workload Statistics: Windows of Opportunity for Drug Smuggling* (last modified Nov. 1, 2002) <http://www.cbp.gov/xp/cgov/toolbox/about/accomplish/swborder_workload_stats.xml>. The risks to the Nation require that Customs officials be able to exercise the full authority conferred on them by Congress, consistent with the Constitution. Given the significant extent to which smuggling occurs in gas tanks, the Ninth Circuit's holding in *Molina-Tarazon* that customs officials may not conduct such searches without reasonable suspicion warrants this Court's review.

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them with and assure them of an immunity that was never intended. * * * If such power [to conduct searches without probable cause] does not rest in the properly constituted authorities nothing can prevent a shipowner or charterer from storing dynamite, high explosives, etc., aboard his boat * * *, safe from the scrutiny of any officer charged by law to regulate such storage and traffic.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA S. BLATT
Assistant to the Solicitor General

JUNE 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-50306
D.C. No. CR-02-00536-IEG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MANUEL FLORES-MONTANO, DEFENDANT-APPELLEE

[Filed Mar. 14, 2003]

ORDER

Before: CANBY, O'SCANNLAIN and T.G. NELSON, Circuit Judges

A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. See *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002); *United States* v. *Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

Crim. Case No. 02cr0536-IEG

UNITED STATES OF AMERICA, PLAINTIFF

v.

MANUEL FLORES-MONTANO, DEFENDANT

[Filed June 20, 2002]

ORDEF SUPPRESSING EVIDENCE

On June 4, 2002, defendant Flores-Montano filed a motion seeking to suppress the 37 kilograms of marijuana seized from the gas tank of his vehicle, contending that the border search that uncovered the drugs was a "non-routine" border search requiring reasonable suspicion and that there was no reasonable suspicion. On June 10, 2002, the Government filed its response in which it contended that the border search was routine and that reasonable suspicion was not required.

This matter was heard on June 17, 2002. Neither side called any witnesses. Defendant Flores-Montano did not introduce any evidence. The Government's evidence consisted of declarations and motion exhibits.

Since no declarations were filed by Flores-Montano and no evidence introduced by him, the Court finds that the facts set forth in the Government's declarations and motion exhibits are the facts in this case.

Relying on the recent case of *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), the Court holds that the search of the gas tank in this case was "non-routine" and therefore reasonable suspicion was required to justify the search. The Court further holds that the Government has waived its right to rely on the alternative basis of reasonable suspicion, and the Court finds that, in this case, the Government has declined to establish reasonable suspicion. Accordingly, defendant Flores-Montano's motion to suppress the drugs seized from the gas tank is granted.

DATED: June 19, 2002

/s/ IRMA E. GONZALEZ
IRMA E. GONZALEZ
United States District Court
Judge

APPENDIX C

DECLARATION OF VISENTE GARCIA

I, Visente Garcia, declare:

1. I am currently a senior border inspector for the United States Customs Service, and I have been employed as a Customs border inspector since March of 1997.

2. I am familiar with and knowledgeable about the matters set forth in this declaration.

3. On February 12, 2002, at approximately 4:00 p.m., I was working at pre-primary inspection at the Otay Mesa Port of Entry. I approached a 1987 Ford Taurus station wagon (Cal. license #4RXD937) to perform a routine border inspection. I asked the driver, Manuel Flores, routine border inspection questions, such as where he was going, what was he doing in Mexico, whose vehicle it was, what was his citizenship, etc. When Manuel Flores was answering my questions, he avoided eye contact. When he handed me his permanent resident card and his California license, his hand was shaking.

4. After I tapped on the gas tank with my screwdriver and noticed that the fuel tank sounded solid, and I was informed that a narcotics detector dog had "alerted" to the vehicle, I escorted Manuel Flores to the security office. His vehicle was driven to the secondary inspection lot to be more closely inspected.

5. Government motion exhibit 1(a) is a picture of defendant Manuel Flores, the driver of the Ford Taurus station wagon (Cal. license #4RXD937) on February 12, 2002. Government motion exhibit 1(b) is the rear of the

Ford Taurus station wagon (Cal. license #4RXD937) that I referred to secondary inspection on February 12, 2002, a few minutes after 4:00 p.m.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 11, 2002.

/s/ VISENTE GARCIA
VISENTE GARCIA
Customer Border Inspector

Photographs Intentionally Omitted

APPENDIX D

DECLARATION OF JOVITO PESAYCO

I, Jovito Pesayco, declare:

1. I am currently a senior border inspector for the United States Customs Service, and I have been employed as a Customs border inspector since January of 1997.

2. I am familiar with and knowledgeable about the matters set forth in this declaration.

3. On February 12, 2002, at approximately 4:20 p.m., I conducted a routine border inspection of the 1987 Ford Taurus station wagon (Cal. license #4RXD937) at the secondary inspection area of the Otay Mesa Port of Entry. The rear of this vehicle is depicted in Government motion exhibit 1(b). I was informed that a narcotics detector dog had "alerted" to the gas tank area of the vehicle at pre-primary. I tapped the gas tank and it sounded solid.

4. I then requested for a Customs contract mechanic to come to the Otay Mesa Port of Entry so that the gas tank could be searched. Within approximately 20 to 30 minutes, the mechanic arrived. The mechanic put the vehicle on a lift and raised it up. The mechanic then used a portable lift to lower the gas tank so it could be looked at. To lower the gas tank, the mechanic first had to loosen the straps and unscrew the bolts holding the gas tank to the undercarriage of the vehicle. The mechanic also had to disconnect some hoses and electrical connections. The mechanic used force and tools to do this. I estimate that it took approximately 10 to 15 minutes for the gas tank to be lowered.

5. Once the gas tank was lowered, I saw bondo on top of the gas tank. Bondo is a putty like substance that hardens and is used to seal openings and adhere to surfaces. I hammered off the bondo and this revealed an access plate underneath. At most, my hammering off the bondo slightly scratched and possibly slightly dented the gas tank, but the gas tank was just as workable as it was before I removed the bondo. The gas tank was not damaged as far as safety and workability were concerned. This did damage the bondo, but new bondo could easily have been applied. I opened the access plate and found packages wrapped in cellophane and tape inside packages. I tested one of the packages and it was marijuana. All of this took approximately 5 to 10 minutes.

6. The force used to lower the gas tank was not damaging. The straps were undone, some bolts were unscrewed, and some hoses were disconnected. Nothing was permanently altered and nothing was damaged. I have witnessed this procedure hundreds of times in my five years of working as a border inspector. It was easy to disconnect the gas tank, and it would have been easy to connect it back again. The gas tank could have been reconnected without damaging it or the vehicle.

7. Government motion exhibits 2(a-d) are pictures of the gas tank of the Ford Taurus station wagon (Cal. license #4RXD937) that I searched on February 12, 2002. 2(a) shows the gas tank before it was lowered. 2(b) shows the underneath of the vehicle after the gas tank was lowered. 2(c) shows the gas tank after it was lowered and the bondo on it. 2(d) shows the marijuana bricks (approximately 37 kilograms) inside the gas tank.

8. I have reviewed the facts from the case of *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002).

The way the gas tank was lowered and disconnected here is similar to how the gas tank was lowered and disconnected in the *Molina-Tarazon* case.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: June 10, 2002.

/s/ JOVITO PESAYCO
JOVITO PESAYCO
Customer Border Inspector

Photographs Intentionally Omitted

APPENDIX E

DECLARATION OF JAYSON P. AHERN

I, Jayson P. Ahern, declare:

1. Currently, I am the Director, Field Operations, for the Southern California Customs Management Center. I am the principal field officer for Customs Field Operations in Southern California and have been assigned here since February of 2001. In this position, I am responsible for all inspectional operations at the five land border ports of entry in Southern California and at the San Diego airport-seaport facilities. Our primary mission at Customs is ensuring border security, working on anti-terrorism initiatives, and interdicting drugs, contraband, and dangerous materials, while maintaining the smooth flow of legitimate travel and trade.

2. I entered on duty as a United States Customs Service Inspector in June 1977, and my previous work history is as follows:

I served as an Inspector, Senior Inspector and Supervisory Inspector for ten years in San Ysidro, Los Angeles, and Miami. I served as a National Program Manager in Customs Headquarters for Contraband Enforcement Teams as Assistant District Director for four years in Houston. I returned to headquarters as the Director, Anti-Smuggling Division for four years. This was followed by assignments as the Port Director for Customs operations in Miami and Los Angeles for four years, and two years, respectfully.

3. In my capacity as Director, Field Operations, I am familiar with and knowledgeable of the matters set forth in this declaration.

4. Over the past few fiscal years (October 1 through September 30), drug seizures at the Southern California ports of entry have been as follows:

Fiscal Year (FY)	Total Number of Seizures	Gas Tank Seizures (%)
FY 2002 (Oct-Mar)	1,602	478 (29.8%)
FY 2001	3,250	667 (20%)
FY 2000	3,252	754 (23%)
FY 1999	3,959	1,000 (25%)
FY 1998	4,053	1,114 (27%)
FY 1997	2,672	606 (23%)
	18,788	4,619 (24.58%)

Over the past five and a half fiscal years, gas tank drug seizures have accounted for approximately 25% (24.58) of *all* vehicle drug seizures. Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles.

5. Because of the number of gas tank drug seizures, searching gas tanks is routine and finding drugs in them is routine. It is not unusual or infrequent. Searching other compartments is routine and finding drugs in them is routine, not unusual or infrequent.

6. For the Customs Service to be able to carry out its primary function of interdicting drugs, contraband, and harmful materials from entering the United States, it is very important that Customs continues to have the ability to conduct random and suspicionless searches for drugs in gas tanks and other compartments of vehicles at the border. This is an important deterrent to smugglers using gas tanks and other compartments to smuggle contraband, because they would believe that gas tanks and other compartments, as with other areas

in a vehicle, could be searched randomly and with no level of suspicion.

7. Gas tanks and compartment searches are sometimes performed because of confidential information. Having to disclose this information as a matter of course to prove "reasonable suspicion" would compromise confidentiality and jeopardize informants.

8. Gas tank smuggling is already the most common type of vehicle drug smuggling at the Southern California ports of entry. In my opinion, requiring reasonable suspicion to search gas tanks would result in an increase in gas tank smuggling of drugs and other contraband, and other dangerous materials. Requiring reasonable suspicion to search gas tanks would also likely result in greater overall danger to the public, because of the increased danger from more altered gas tanks. Requiring reasonable suspicion for compartment searches involving necessary damaging force would result in an increase in compartment smuggling of drugs, contraband, and other dangerous materials.

9. In cases where a border search at the California ports of entry takes place and no contraband is discovered, it is Customs' policy to reassemble and reinstall any gas tanks that are disassembled during a border search. Customs will inform the driver whenever a border search resulting in the disassembly of a vehicle gas tank or property damage to a vehicle takes place. Finally, if Customs causes any damage to property during such a border search, Customs will provide the necessary forms to the driver or owner so that a monetary claim can be filed under applicable law.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: June 10, 2002.

/s/ JAYSON P. AHERN
JAYSON P. AHERN
Customs Field Operations
Director

APPENDIX F

DECLARATION OF DIANE HINCKLEY

1. Currently, I am the Assistant Director for Inspections, Immigration and Naturalization Service (INS), San Diego District. I am the inspections manager for the district's six ports of entry, which include the ports of San Ysidro, Otay Mesa, Tecate, Calexico, Calexico East, and Andrade. I oversee the operation of the ports, manage new initiatives, coordinate with INS regional and headquarters components, and am the supervisor of the INS port directors for these six ports.

2. I entered on duty with the INS on April 24, 1978, as an inspector in El Paso, Texas. Later I became a first-line supervisor in El Paso, Texas. Later I became a first-line supervisor in El Paso, then INS regional officer, then headquarters officer, and subsequently a supervisor of the Headquarters Land Border Inspections staff. Afterwards, I transferred to the Calexico Port of Entry as port director, and then became manager of all the ports for the San Diego District.

3. In my capacity as Assistant District Director for Inspections, I am familiar with and knowledgeable about the matters set forth below.

4. In Inspections, we distinguish between smuggling aliens in trunks and in other vehicle compartments, reserving the term "compartments" for non-trunk smuggling cases. One reason for this distinction is that compartment cases are usually more dangerous for the persons smuggled than trunk cases. Compartment cases involving smuggling in and near gas tanks are especially dangerous because often fumes remain in the tanks, oxygen does not circulate well in these rebuilt or

modified enclosed areas, movement by the occupant is extremely restricted, and the person smuggled is usually unable to extricate himself or herself from the compartment.

5. Instances of persons smuggled in and around gas tank compartments are not uncommon at the ports of entry, averaging one approximately every ten days at San Ysidro and Otay Mesa. Because these cases occur regularly, inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles.

6. To require reasonable suspicion for an INS inspector to search a gas tank compartment area, or to use necessary damaging force to search a vehicle compartment, will likely result in fewer gas tank compartment area and other compartment searches, additional persons being successfully smuggled in gas tank compartment areas and other compartments for alien smuggling, and more attempts to use gas tank compartment area and other compartments for alien smuggling. Smugglers detect weak points readily and exploit them. Such a situation would increase the likelihood of someone dying in a gas tank compartment area or other compartment while being smuggled. Most of the persons the INS pulls from gas tank compartment areas and other compartments are nauseated, dehydrated, their skin is flushed, they are weak and sometimes unable to stand. We often give them immediate first aid and send them to a hospital in an emergency unit. The INS has pulled not only adults but children and old people, sometimes two at a time, from gas tank compartment areas and other compartments. Twin compartments in or near a gas tank are not unusual. As

part of the vehicle's modification, gasoline is sometimes siphoned into the motor from a plastic bottle in the engine or from a specially built small tank in the trunk; there are many variations in reconstructing the working gas tank. An established key to effective enforcement for inspectors is random checking, coupled with following up on suspicions. Random checking reduces inspector fallibility and helps deter attempts to break the law because everyone is subject to random selection. Requiring reasonable suspicion to search gas tank compartment areas and other compartments could lead to gas tank compartments and other compartments becoming the preferred choice for alien smuggling in the Southern District of California.

7. The pictures from Government motion exhibit 4(a)(1-5) depict an illegal alien being found in the gas tank compartment area of a vehicle being searched at the San Ysidro Port of Entry in the past 18 months. The pictures from Government motion exhibit 4(b)(1-5) depict an illegal alien being found in the gas tank compartment area of a vehicle being searched at the San Ysidro Port of Entry in the past 18 months. The pictures from Government motion exhibit 4(b)(1-5) depict an illegal alien being found in the gas tank compartment area of a vehicle being searched at the San Ysidro Port of Entry in the past 18 months. The pictures from Government motion exhibit 4(c)(1-7) depict an illegal alien being found in the modified gas tank of a vehicle being searched at the San Ysidro Port of Entry.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 4, 2002.

/s/ DIANE HINCKLEY
DIANE HINCKLEY
Assistant Director of
Inspection Director
Immigration and
Naturalization Service

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50171

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOSE MOLINA-TARAZON, DEFENDANT-APPELLANT

DEC. 7, 2000
[Filed Jan. 29, 2002]

OPINION

Before: D.W. NELSON, BRUNETTI and Kozinski, Circuit Judges.

KOZINSKI, Circuit Judge.

Looking for contraband, customs agents removed and dismantled Jose Molina-Tarazon's fuel tank. We consider whether this procedure is a "routine" border search for which no suspicion whatsoever is required.

I

At approximately 3:30 one early morning, Molina entered the United States from Mexico driving a pickup truck. Molina was directed to secondary, where Customs Inspector Kevin Brown ordered a narcotics-trained dog to sniff the truck. When the dog failed to

alert, Brown inspected the truck's undercarriage with an autocreeper.[1] Brown then turned his attention on the gas tank.

Brown first tried to look into the tank with a fiberoptic scope,[2] but was stopped by an anti-siphoning valve.[3] He then summoned an off-site contracting mechanic, who arrived fifteen or twenty minutes later. The mechanic hoisted the truck onto a lift and removed several bolts and straps that connected the tank to the truck, disengaging electrical connections and hoses in the process. The mechanic then removed the sensing unit, revealing thirty-one packages of marijuana inside the tank.

Charged with violating 21 U.S.C. §§ 841(a)(1), 951 and 960, Molina challenged the search on the grounds that the government lacked reasonable suspicion. The government argued that it needed no suspicion because the search was routine. The district court held that, even if the search was not routine, the officers had reasonable suspicion based on unnatural mud patterns they observed during their visual inspections of the gas tank. Molina entered a conditional guilty plea and now appeals the district court's suppression ruling.

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[1] An autocreeper is a mirror attached to the end of a long pole with which one can view the undercarriage of a vehicle.

[2] Brown testified that a fiberoptic scope is similar to a telescope with six feet of light-carrying cable that the operator can feed into the fill neck.

[3] A manufacturer-installed device consisting of a ball that prevents insertion of a solid object into the gas tank.

II

While the Fourth Amendment generally prohibits warrantless searches without probable cause, it is subject to a few narrow and well-delineated exceptions. One such exception is the border search. *Carroll* v. *United States*, 267 U.S. 132, 154, 45 S. Ct. 280, 69 L.Ed. 543 (1925). Authorized by the same Congress that proposed the Fourth Amendment, the border search has a long history of judicial and public acceptance. See 4 Wayne R. LaFave, *Search and Seizure* § 10.5(a), at 531, 535 (3d ed. 1996).[4] As the Supreme Court has observed, "[b]order searches . . . [are] considered to be 'reasonable' by the single fact that the person or item in question ha[s] entered into our country from outside." *United States* v. *Ramsey*, 431 U.S. 606, 619, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977). Pursuant to this exception, routine searches of persons and their effects entering the country may be conducted without any suspicion whatsoever. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537-38, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985).

But border searches are not exempt from the irreducible constitutional requirement of reasonableness. The border search exception therefore authorizes only *routine* searches; it does not authorize any kind of

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[4] The border search exception is codified at 19 U.S.C. § 1581(a), which provides that "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States . . . or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers, and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

search in any manner whatsoever. In order to conduct a search that goes beyond the routine, an inspector must have a reasonable suspicion that the person to be searched may be carrying contraband. *United States* v. *Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir.1994).

While we have never defined the limits of a routine search, we have observed that the critical factor is the degree of intrusiveness it poses. *Id.* at 61. This is consistent with the approach of several other circuits, which have held that the distinction between "routine" and "nonroutine" turns on the level of intrusiveness. See, e.g., *United States* v. *Uribe-Galindo*, 990 F.2d 522, 525-26 (10th Cir.1993); *United States* v. *Braks*, 842 F.2d 509, 511-12 (1st Cir. 1988). Our case law recognizes four categories of searches as being so intrusive as to be clearly nonroutine: Body cavity, strip, pat down and involuntary x-ray searches. See *Montoya de Hernandez*, 473 U.S. at 541 n.4, 105 S. Ct. 3304; *United States* v. *Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995). By contrast, we have held that searches of handbags, luggage, shoes, pockets and the passenger compartments of cars are clearly routine. See *Montoya de Hernandez*, 473 U.S. at 538, 105 S. Ct. 3304; *Ramos-Saenz*, 36 F.3d at 61-62; *United States* v. *Sandoval Vargas*, 854 F.2d 1132, 1134 (9th Cir. 1988); *United States* v. *Palmer*, 575 F.2d 721, 723 (9th Cir. 1978).

In *Ramos-Saenz* we observed that a border search goes beyond the routine "only when it reaches the degree of intrusiveness present in a strip search or body cavity search." *Ramos-Saenz*, 36 F.3d at 61. The government seizes on this phrase to argue that a border search is always routine unless it involves a search of the person; at oral argument government counsel went so far as to assert that "the border search authority

gives the government the right to dismantle a car with no reasonable suspicion whatsoever." Were we to accept this argument, it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box. We think not. We hold, rather, that some searches of inanimate objects can be so intrusive as to be considered nonroutine.

Determining when an inanimate object search becomes as intrusive as a body search is tricky. Object searches certainly do not cause the same degree of personal indignity as searches of the human body. But causing indignity is just one way a search can be intrusive; there are others. We write on a relatively clean slate because we have never identified what factors render the search of an object nonroutine. However, our analysis is informed by factors we consider in the border search context, as well as those from our general Fourth Amendment jurisprudence.

III

Three aspects of the search here render it nonroutine: Force was used to remove and disassemble the fuel tank; the procedure involved some risk of harm; and someone whose vehicle was subjected to such a search is likely to feel a diminished sense of security.[5]

A. *Use of Force*

Courts that have considered searches of inanimate objects in the border context have found the use of force to be a critical factor in assessing intrusiveness.

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[5] These happen to be the factors relevant in our case. We do not rule out the possibility that other factors, such as protracted delay in completing the search, may render a search nonroutine.

See *United States* v. *Rivas*, 157 F.3d 364, 367-68 (5th Cir. 1998); *United States* v. *Robles*, 45 F.3d 1, 5 (1st Cir. 1995). We have noted, albeit not in the border search context, that force is a factor that bears on the intrusiveness of the search. *United States* v. *Perez*, 37 F.3d 510, 516 (9th Cir. 1994) (observing that sniff search of a car is unintrusive because it involves no forcing of closed containers or sealed areas). Searches of inanimate objects that courts have held to be routine generally have not involved the use of force. See e.g., *United States* v. *Uribe-Galindo*, 990 F.2d 522 (9th Cir. 1993).

While force is a factor in assessing a search's intrusiveness, it is not dispositive. For example, if the lock is jammed on a suitcase or its owner refuses to present a key, agents have to employ some degree of force to gain access to its interior. But this fact alone does not render a search overly intrusive. Conversely, other types of searches for which force is *not* required have been deemed overly intrusive: No degree of force is required to effect an x-ray search or to issue an order to disrobe, both of which we have consistently found to be so intrusive as to be nonroutine. *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). While not dispositive, the use of force in conducting a search will weigh against finding the search routine.

What constitutes the use of force depends on the circumstances. Certainly, if the search requires breaking, drilling into or permanently altering a portion of the item being searched, that is a use of force. Similarly, if the search involves the use of tools and the application of physical force to those tools, this will also amount to the use of force.

The search of Molina's truck required the use of tools. The mechanic hoisted the truck onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and the sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by unscrewing the pump unit and removing the pressed in "bushing" which held the tank to the truck. All of those actions required the use of force and in their totality they raise the inference that this was not a routine search.

B. *Danger*

The Supreme Court has held that if a search poses a danger to the subject, this is a significant factor bearing on whether the search is reasonable under the Fourth Amendment. In *Winston* v. *Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985), the Court considered whether forcing a suspect to undergo minor surgery to remove a bullet was such a serious intrusion as to be unreasonable. In holding that it was, the Court noted that a crucial factor in analyzing the magnitude of a search's intrusiveness "is the extent to which the procedure may threaten the *safety* or health of the individual." *Id.* at 761, 105 S. Ct. 1611 (citing *Schmerber* v. *California*, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)) (emphasis added). The Court reached this conclusion despite a dispute over how much danger, if any, the surgery would actually pose.[6]

In *Schmerber*, the Court held that forcing a suspect to have his blood drawn was insufficiently intrusive to

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[6] In *Winston*, there was testimony that the surgery would require only a small incision and could be performed under local, as opposed to general, anesthesia. 470 U.S. 753, 763-64 & nn.7-8, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985).

overcome society's interest in preserving evidence of drunk driving. In reaching this conclusion, the Court focused on three factors: First, the procedure involved no risk, trauma or pain. *Id.* at 771, 86 S. Ct. 1826. Second, a physician—a licensed professional—performed the procedure in a hospital environment, according to accepted medical practices. *Id.* Third, having blood drawn is "routine in our everyday li[ves]" and a requisite for many entering particular schools, professions and institutions (and therefore, presumably, did not involve a significant degree of risk). *Id.* at 771 n. 13, 86 S. Ct. 1826 (quoting *Breithaupt* v. *Abram*, 352 U.S. 432, 436, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957)).

In assessing the intrusiveness of border searches, we have also considered the dangerousness of the search. In *Ek*, concerns over the danger and potential long-term health effects posed by an x-ray search weighed heavily in our conclusion that x-ray searches were more intrusive than strip searches. We observed that being subjected to an x-ray search, although not as humiliating as being instructed to disrobe, is nonetheless more intrusive because of its potentially dangerous health consequences. *Id.* at 382. Notably, we came to this conclusion even though the record was silent on the danger or harmful effects associated with x-ray searches.

The border search jurisprudence of other circuits supports the view that the relative safety of various search methods is an important factor in the intrusiveness analysis. See *United States* v. *Johnson*, 991 F.2d 1287, 1292 (7th Cir. 1993) (noting, as a factor in categorizing the search as routine, that it involved no harm); *Braks*, 842 F.2d at 512 (an important factor in determining whether a search is routine is "whether

the type of search exposes the suspect to pain or danger"); *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1345 (11th Cir. 1984) (risk of injury is a factor entitled to independent consideration); *United States* v. *Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981) (search at issue presented a relatively low degree of intrusiveness because it was, inter alia, not dangerous).

The search in this case presents a similar, and arguably more immediate, risk of danger than the x-ray in *Ek*.[7] An error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner. For example, the mechanic charged with reattaching the hoses and electrical connections might fail to secure them properly, leading to a fuel leak that causes a fire or explosion. Or, he might not reattach the straps securing the tank to the body of the truck tightly enough, causing the tank to shake loose.[8] These examples do not represent an exhaustive list of the dangers associated with this type of search. Yet they provide

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[7] While the record does not address the danger associated with driving a vehicle after certain critical internal parts have been dismantled and reattached, the point is not one that requires much documentation. The government seems to acknowledge that different searches implicate different kinds of risks: In urging that the use of the fiberoptic scope was part of a routine search, for example, the government's brief noted that such devices allow for the inspection of cars without damaging them.

[8] These risks need not come to fruition in every case. It is sufficient that, if the search is repeated, the risks will materialize on occasion, such as when the mechanic employed to do the work is careless or unskilled.

ample support for the view that the search in this case created a risk of harm.

C. *Fear*

A third factor we consider is whether the search is psychologically intrusive. People's minds are as vulnerable to intrusion as their physical possessions. As Justice Brandeis observed in *Olmstead* v. *United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L.Ed. 944 (1928)

> The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. at 478, 48 S. Ct. 564 (Brandeis, J., dissenting).

The imposition of fear is a type of psychological intrusion. The Supreme Court has therefore recognized that the level of fear a particular search is likely to engender is a significant factor in evaluating its intrusiveness. In *United States* v. *Ortiz*, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975), the Court concluded that fixed checkpoints are "far less intrusive" than roving patrols, observing that the latter are more apt to "frighten[ ] or annoy[ ]" motorists. *Id.* at 894-95, 95 S. Ct. 2585. The Court reaffirmed its preference for fixed checkpoints in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976), noting that, in comparison to roving searches, "the subjective intrusion

—the generating of concern or even fright on the part of lawful travelers—is appreciably less." *Id.* at 558, 96 S. Ct. 3074. We read these cases for the proposition that government intrusions into the mind—specifically those that would cause fear or apprehension in a reasonable person—are no less deserving of Fourth Amendment scrutiny than intrusions that are physical in nature.

We conclude that the search conducted here would make a reasonable driver—one aware that a mechanic working for the government dismantled and reassembled a component critical to his vehicle's safe operation—apprehensive about getting back into his vehicle and continuing on his way. The driver's apprehension would certainly be heightened if he faced the prospect of driving a long distance at high speed. The diminished sense of personal security associated with driving a potentially unsafe one-and-a-half ton automobile is exactly the type of unwarranted psychological intrusion against which the Fourth Amendment was meant to protect.

The type of search conducted here could contribute to a driver's apprehension in various ways. First, the work was performed by a government contractor whose qualifications, reputation and expertise are unknown to the vehicle's owner, rather than by a mechanic the owner knows and trusts. The owner does not know whether the contractor is licensed to perform the work or what standards, if any, were used in selecting him. The owner is unable to choose a mechanic in whom he does have confidence.

Second, the driver might doubt the mechanic's incentive to take adequate precautions in dismantling and reassembling portions of the vehicle, considering that

the mechanic's objectives are materially different in the border search context than in a traditional market setting. The mechanic lacks the independent incentive to undertake the procedures with the caution, skill and precision he might exercise if the owner were a repeat customer; those having their vehicles searched at the border are unlikely to return for additional work in the future. The mechanic's concern is to remove and dismantle parts quickly, so that the agents can search for contraband; if they come up emptyhanded, the mechanic's primary concern will be to finish the job promptly, not necessarily to reassemble the vehicle with the greatest care.

Finally, a search as extensive as the one performed on Molina's truck—one involving the dismantling and reassembling of components critical to the vehicle's functioning and safe operation—leaves the normal driver unable to confirm whether everything is restored to its original state. Absent special expertise, the driver has no way of verifying the correct reassembly of the fuel tank. If the pump unit is returned to its original position within the tank, and the tank is then reconnected via straps, bolts and hoses, the driver has no way to tell whether the tank and related mechanisms are in a safe working condition. In contrast to less intrusive techniques that employ minimal force or allow for ready inspection by the layperson, where the search includes the dismantling of a mechanical part in the motor vehicle, the driver has little independent opportunity to allay his fear that the vehicle may leave him stranded on the freeway—or far worse.

* * * * * *

The use of force required to effect the tank's removal, coupled with the potential danger associated with driving a vehicle after a component vital to its proper functioning is dismantled and reassembled, and the consequent diminution in the driver's sense of personal security, results in a significant degree of intrusiveness. We conclude that the removal, disassembly and search of Molina's fuel tank was not a routine search.

IV

That the search was not routine does not necessarily render it unlawful. The search would still have been lawful if the officers conducted it based on a reasonable suspicion that Molina might have been concealing contraband. See *United States* v. *Teague*, 18 F.3d 807, 812-13 (9th Cir. 1994). We therefore consider whether the customs agents had reasonable suspicion to justify the search.

At the primary inspection area, Customs Inspector George Volz took a look around the truck for signs of smuggling. Looking through the fender well, Volz observed an unusual distribution of mud in the areas of the truck's under-carriage surrounding the gas tank: While there was a lot of mud on top of the tank's sensing unit, the rest of the unit was entirely clean. Volz discovered an abundance of mud lodged in out-of-the-way spaces behind the bolts that attached the tank to the undercarriage of the truck. The hoses connecting the tank to the truck also had splattered mud. Volz found that the mud did not appear to have been "splattered" naturally, but instead appeared to have been sprayed on with a paint gun or pressure hose.[9]

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[9] Inspectors Volz and Brown both testified that they had extensive on-the-job training in the different types of mud appli-

The unnatural looking distribution and application of the mud suggested to Volz that someone had recently tampered with the tank. Inspector Volz also observed that the gas hoses looked freshly replaced—another factor that, in his experience, suggested recent removal of the tank. Based on these observations, he directed Molina to secondary. There, Inspector Brown observed the same unnatural mud distribution and application—in particular the fact that the tank's sensing unit was too clean in relation to the rest of the tank—and came to the same conclusion as Volz. He therefore examined the undercarriage of the truck and observed patterns of mud and clamp marks that indicated the sensing and pump units had recently been removed. These observations provided reasonable suspicion to justify the dismantling of Molina's fuel tank.

Accordingly, the search was lawful and the information gained from it could lawfully be used to prosecute Molina. The district court did not err in denying the suppression motion.

AFFIRMED.

BRUNETTI, Circuit Judge, concurring in the result:

FACTS

On September 10, 1999, at approximately 3:36 a.m., Jose Molina-Tarazon entered the Calexico West Port of Entry. He was the sole occupant of a 1991 Dodge Dakota pickup truck. He was met by U.S. Customs

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cation techniques employed by contraband smugglers, and that when mud is unnaturally applied, it tends to run before drying. Agent Volz also testified that unnaturally applied mud lacks the "fine white mist" characteristic of mud that splatters on vehicles naturally.

Inspector George Volz. Inspector Volz initially became suspicious because Molina Tarazon was wearing a brand new hat perched on top of his head "like he was afraid to mess up his hair", and also wearing black horn-rimmed glasses. Inspector Volz explained that prior experience working the pedestrian lanes, where mainly farm-workers enter, led him to suspect Molina Tarazon was impersonating a U.S. citizen. This led Inspector Volz to doubt Molina-Tarazon's declaration that he was a United States citizen, and to further inspect the vehicle for signs of smuggling.

After an inspection of the gas tank, Inspector Volz' suspicions were further heightened by the fact that the mud appeared to be artificially applied, rather than accumulated through normal wear. Specifically, although the top of the tank was dirty and there was mud behind the bolts that held the tank, the sensing unit was not dirty. Inspector Volz further noted that the gas tank hoses appeared new. At this point, Volz referred Molina-Tarazon to further inspection.

At the secondary inspection area, Molina-Tarazon was met by U.S. Customs Inspector Kevin Brown. Molina-Tarazon stated that the truck belonged to his wife. The truck was then inspected by a canine unit which failed to alert for drugs. Inspector Brown used a mirror to inspect the truck's gas tank. Brown also tried to insert a fiberoptic scope into the gas tank, but was unsuccessful because of a blockage. Brown then crawled underneath the tank to conduct a physical inspection. He observed what he believed to be signs that the "sending unit and/or pump unit had been off recently." Brown noted that the mud on the gas tank did not appear consistent with the bottom chassis of the truck and that the pump unit was basically clean. This

entire inspection lasted 10-12 minutes. At that point, Brown called a local contracting mechanic to come and remove the gas tank on site. It took approximately 15-20 minutes for the mechanic to arrive.

According to Inspector Brown, the removal of the gas tank involves: putting the truck on a mechanical lift, disconnecting the filler hose, the hose going to the engine and the corresponding electrical connections, and loosening the straps that hold the tank to the chassis. Neither a torch nor hacksaw was used, and the gas tank can be reattached without causing any damage. It took approximately 10-15 minutes to remove the gas tank. Drugs were ultimately recovered from the gas tank.

SPECIAL CONCURRENCE

I concur in the majority's opinion to the extent that vehicular border searches could conceivably be conducted in a manner so intrusive as to render the search non-routine. When such searches occur, a reasonable suspicion on the part of law enforcement is required. I also concur in the result as I believe the Customs Inspectors had a reasonable suspicion to justify this search no matter what its category.

I am unable, however, to concur in the analysis in Part III of the opinion because I believe it goes too far. There is a very real distinction between the removal or disassembly of part of an automobile in the ordinary course of inspection, and the application of destructive force in order to facilitate inspection. See *United States* v. *Carreon*, 872 F.2d 1436 (10th Cir. 1989) (drilling into camper required reasonable suspicion); *United States* v.

Rivas, 157 F.3d 364 (5th Cir. 1998) (drilling into body of trailer was not routine search and required reasonable suspicion); *United States* v. *Robles*, 45 F.3d 1 (1st Cir. 1995) (drilling into machine part required reasonable suspicion).

The search at issue here is an example of the simple disassembly of a gas tank in the ordinary course of inspection. As the district court pointed out:

> The intrusion here was not great. Nothing was broken. Some bolts
>
> > were unscrewed, and the tank was lowered. There wasn't any connection from the tank to the vehicle that was broken, it was just straps that held it in place, so it could be restrapped back. It is not like it is bonded or glassed or welded in place where they had to break the welds. Two hoses were removed, the filler hose and the sending hose, and the tank was lowered and the cap was unscrewed, and there was the marijuana.

This inspection was conducted in a matter of 10-15 minutes with no permanent alteration or resulting harm to Molina-Tarazon's vehicle.

The majority's opinion seizes on the use of tools and employment of a mechanic to "raise the inference that this was not a routine search." Such a finding labels any routine dismantlement by a mechanic, from the removal of fender to bumper, a non-routine inspection. As discussed above, the use of force that somehow alters or damages the vehicle is far more intrusive than the simple disassembly and reassembly that occurred here. The majority opinion also focuses on the inherent psychological fear that stems from the possibility that a mechanic not of the detainee's choosing may fail to re-

assemble the vehicle in a safe and reliable manner. The risk of negligent reassembly or replacement may create fear that would never be overcome in any circumstances, including the simplest dismantlement.

For these reasons, I cannot concur in the analysis in Part III of this opinion.

SEP 10 2003

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1794

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

MANUEL FLORES-MONTANO,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 United States Code §3006A(d)(6) and Rule 39 of this Court, Respondent, Manuel Flores-Montano, asks leave to file the attached Brief in Opposition to the United States' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18 United States Code §3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: 10 September 2003

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

MANUEL FLORES-MONTANO,

RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION
TO UNITED STATES' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-1794

UNITED STATES OF AMERICA,

Petitioner,

- v -

MANUEL FLORES-MONTANO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
UNITED STATES' PETITION FOR WRIT OF CERTIORARI

Respondent Manuel Flores-Montano respectfully requests that the Court deny the Solicitor General's petition for a writ of certiorari filed on behalf of the United States.

OPINION BELOW

The order of the United States Court of Appeals for the Ninth Circuit is unreported. The order of the district court is unreported.

JURISDICTION

On March 14, 2003, the Ninth Circuit entered its judgment. United States' Petition for a Writ of Certiorari (Pet.), App. at 1a. The government has invoked the Court's jurisdiction under 28

U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

STATEMENT OF THE CASE

A. Facts

1. The Search of Respondent's Vehicle Was Not Routine; Contract Mechanics Completely Dismantled the Gas Tank of the Vehicle Driven by Respondent.

On February 12, 2002, Respondent attempted to enter the United States at the Otay Mesa Port of Entry as the driver of a 1987 Ford Taurus station wagon. Pet., App. at 7a. Respondent was ordered out of the vehicle and taken to the security office. Pet. at 3. Customs inspectors drove the car to the secondary inspection area for a thorough inspection. Id.

After a narcotics detector dog alerted to the station wagon, customs inspectors decided to search the gas tank. Pet., App. at 4a, 7a. Recognizing that the removal and disassembly of a fuel tank creates significant risks to an operator of a motor vehicle, the Customs Service has adopted a policy requiring that every gas tank removal/disassembly be performed by an off-site contract mechanic from the private sector. Pet. at 15. Accordingly, the

inspectors called a contract mechanic to come to the port of entry. Pet., App. at 7a. After a delay of approximately 20 to 30 minutes, the mechanic arrived. Id. Inspector Pesayco took the car to a hydraulic lift where the mechanic elevated it. Id.

The actual removal of the gas tank involved several different operations by the government's contract mechanic, all performed in a manner similar to the disassembly detailed in the Ninth Circuit's decision in United States v. Molina-Tarazon, 279 F.3d 709 (9th Cir. 2002). See Pet., App. at 8a-9a.

> The mechanic hoisted the [vehicle] onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and the sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by unscrewing the pump unit and removing the "bushing" which held the tank to the [vehicle]. All of those actions required the use of force... .

Molina-Tarazon, 279 F.3d at 714. It took approximately ten to fifteen minutes for the mechanic successfully to lower the gas tank on a second, portable lift. Pet., App. at 8a. He did not reassemble the vehicle.

After the contract mechanic lowered the tank, Customs Inspector Pesayco noticed bondo on top of it. See Pet., App. at 8a. The inspector hammered off the bondo, which revealed an access plate underneath. Id. The inspector's hammering scratched and "possibly slightly dented" the tank. Id. The

bondo was destroyed. Id. The inspector then opened the access plate and found cellophane wrapped packages containing marijuana inside. Id. Customs inspectors discovered 37 kilograms of marijuana (including the weight of the packaging) in the tank. Id. It took Inspector Pesayco roughly five to ten minutes to hammer away the bondo and remove the access plate. Id.

2. The Declarations Submitted by the Government Below Did Not Establish That the Search Conducted Here Was Routine.

In an effort to re-characterize its use of contract mechanics to dismantle a vehicle as "routine," the government submitted several declarations to the district court. For instance, Jayson P. Ahern, Director, Field Operations, for the Southern District of California Customs Management Center, reports that close to 25% of all drug seizures at the Southern California ports of entry have been gas tank seizures. Pet. App. 11a-12a.[1] Although Director Ahern states that "searches" of gas tanks are "routine," he does not claim that disassembly of fuel systems is "routine." Id. at 12a. Similarly, although he believes it is "very important that Customs continues to have the ability to conduct random and suspicionless searches for drugs in gas tanks and other compartments at the border," id., he does not

[1] Director Ahern does not discuss the remaining 75% of seizures

claim that Customs conducts "random and suspicionless" disassembly of gas tanks.

Director Ahern speculates that "[r]equiring reasonable suspicion for compartment searches involving necessary damaging force would result in an increase in compartment smuggling of drugs, contraband, and other dangerous materials." Id. at 13a. Director Ahern does not support his *ipse dixit* with any statistics or other evidence, even though federal courts in other border districts have ruled that such searches are nonroutine searches requiring reasonable suspicion for at least 15 years. See, e.g., United States v. Rivas, 157 F.3d 364, 367 (5th Cir. 1998); United States v. Carreon, 872 F.2d 1436, 1440-42 (10th Cir. 1989).

The Declaration of Diane Hinckley, Assistant Director for Inspections, Immigration and Naturalization Service ("INS"), San Diego District, is to the same effect. Assistant Director Hinckley reports that gas tanks are used for smuggling undocumented aliens into the United States, and that the use of such smuggling techniques is "not uncommon." Pet., App. 15a-16a.

Like Director Ahern, Assistant Director Hinckley claims that "inspectors often search gas tank compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." Id. at 16a. But, also like Director Ahern, she makes

no claim that inspectors routinely dismantle gas tanks as part of these efforts. Assistant Director Hinckley also offered her opinion -- unsupported by any statistics -- that "[r]equiring reasonable suspicion to search gas tank compartment areas and other compartments could lead to gas tank compartments and other compartments becoming the preferred choice for alien smuggling in the Southern District of California." Id. at 16a-17a. She offers no evidence that these smuggling techniques have "becom[e] the preferred choice for alien smuggling" in those districts that have recognized the reasonable suspicion requirement for nonroutine searches for several years.

B. Proceedings Below

On February 27, 2002, the grand jury for the Southern District of California returned a two-count indictment alleging that Respondent imported approximately 37 kilograms of marijuana in violation of 21 U.S.C. §§ 952 and 960 and possessed with intent to distribute approximately 37 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1).

On June 7, 2002, Respondent filed a motion to suppress the fruits of the nonroutine border search of the station wagon he was driving. On June 20, 2002, the district court entered an order suppressing the evidence seized from the vehicle. See Pet., App. at 16a-17a. Relying upon Molina-Tarazon, 279 F.3d

709, the district court held that the search of the fuel tank was a nonroutine search requiring reasonable suspicion and that the government had both declined to establish reasonable suspicion and "waived its right to rely on the alternative basis of reasonable suspicion." Pet., App. at 16a-17a.

On June 20, 2002, the government filed a Notice of Appeal to the Ninth Circuit. On July 26, 2002, the government petitioned the Ninth Circuit Court of Appeal to convene an en banc panel for the purpose of reconsidering Molina-Tarazon. On March 14, 2003, the Court of Appeal issued a summary affirmance of the district court's judgment, stating that "[a] review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument." Pet., App. at 1a. The petition for en banc review was denied without written order. Pet. at 5 n.2.

REASONS FOR DENYING THE PETITION

In United States v. Montoya De Hernandez, 473 U.S. 531, 541 (1985), the Court held that the detention of a traveler at the border "beyond the scope of a routine customs search and inspection," must be supported by reasonable suspicion. Since this seminal decision, every Circuit that has addressed the "nonroutine border search doctrine" in the context of searches of property has held that certain searches of inanimate objects are nonroutine, and that such searches must be supported by reasonable suspicion. In Molina-Tarazon, 279 F.2d 709, the decision upon which the panel in the instant case relied, the Ninth Circuit Court of Appeal adopted this long-held, unanimous view.

The Solicitor General now petitions for a writ of certiorari, arguing that the Ninth Circuit Court of Appeal erred in applying the nonroutine border search doctrine to the search of an inanimate object, Pet. at 12-13, or, in the alternative, that even if the search was nonroutine, it nonetheless need not be supported by reasonable suspicion. Pet. at 15-16. These positions are contrary to the holdings of every Circuit court that has addressed these issues.

As a matter of public policy, the government also now contends that the Court of Appeal's decision "threatens to impair

the government's ability to protect the border." Pet. at 17. The Solicitor General's claim is not supported by the record. First, the evidence offered below does not demonstrate that the constitutional requirement that a nonroutine search be supported by reasonable suspicion in any way compromises the ability of the Customs and Immigration services to protect the Nation's borders. None of the evidence offered below demonstrates that either the Customs Service or the INS employ policies of conducting the sort of intrusive search undertaken in the instant case -- involving disassembly of a gas tank -- on a random basis. In short, there is no evidence that the day to day practices of these agencies have in any significant way been disturbed by the modest requirement of reasonable suspicion imposed by Molina-Tarazon.

Perhaps more importantly, none of the evidence offered below demonstrates that the missions of the Customs Service or the INS have in any way been compromised in those Circuits that applied the nonroutine search doctrine to inanimate objects prior to the Ninth Circuit's decision in Molina-Tarazon. In fact, the applicability of the nonroutine search doctrine to personal property was recognized at least 15 years ago in the Tenth Circuit, and at least 5 years ago in the Fifth Circuit. Although these two Circuits contain ports of entry that are at least as busy as those in Southern California, the government offered no

evidence at all of negative consequences in those Circuits.

Because there is no disagreement among the Circuit Courts of Appeal, nor has an important federal question been decided in a way that conflicts with relevant decisions of this Court, (see Rule 10 of the Rules of the Supreme Court of the United States) the petition for a writ of certiorari should be denied.

A. Every Circuit Court of Appeal that has Addressed the Issue Agrees that the Nonroutine Border Search Doctrine Applies to Searches and Seizures of Inanimate Objects, Including Vehicles.

By applying the nonroutine search doctrine to disassembly of a vehicle's gas tank, see Molina-Tarazon, 279 F.3d at 713-17, the Ninth Circuit joined at least three other Circuits that have recognized that certain intrusive searches of personal property are not routine. In fact, every Circuit to address the issue of whether a search of personal property can be nonroutine has held that the nonroutine border search doctrine does apply to searches of inanimate objects and that such nonroutine searches must be supported by reasonable suspicion. See Rivas, 157 F.3d at 367-68 (suppressing evidence where nonroutine search involving the drilling of a hole in a camper shell was not supported by reasonable suspicion); United States v. Robles, 45 F.3d 1, 5 (1st Cir. 1995) ("*The government concedes* that drilling a hole in the cylinder was nonroutine")(emphasis added); Carreon, 872 F.2d at

1441-42 (drilling small hole in camper shell was nonroutine search justified by reasonable suspicion).[2] Thus, the Ninth Circuit's application of the nonroutine search doctrine to certain highly intrusive searches of personal property enjoys unanimous support.

The Solicitor General's petition completely overlooks that support. Instead, he focuses on the Court's recognition of the border search exception to the probable cause requirement and the various statutes that have authorized border searches. Pet. at 6-12. While it certainly is true that the border search doctrine gives officials wide latitude to conduct searches at the border, see, e.g., United States v. Ramsey, 431 U.S. 606, 616 (1977), the Court has been careful to describe that authority as applicable to "routine" searches. Thus, in Montoya de Hernandez, the Court observed that "*[r]outine* searches of the persons and effects of entrants are not subject to any requirement of

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[2] Although the Solictor General cites United States v. Nieves, 609 F.2d 642 (2d Cir. 1979), see Pet. at 12, Nieves is not inconsistent with Molina-Tarazon, Rivas, Robles and Carreon. Rather, defendant Nieves argued only that the "search of his *person* went beyond a routine border search." 609 F.2d at 645 (emphasis added). Specifically, Nieves contended that the removal and search of his shoes was a "strip search," subject to the "reasonable suspicion standard." Id. at 645-46. Because Nieves did not raise the issue of the applicability of the nonroutine search doctrine to personal property, the Nieves Court did not consider whether the drilling of holes in Nieves' shoes was a destructive, and therefore nonroutine, search.

reasonable suspicion, probable cause, or warrant.' 473 U.S. at 538 (citation, footnote omitted; emphasis added). Ramsey similarly characterizes the border search doctrine: "It was 'without doubt' that the power to exclude aliens 'can be effectuated by *routine* inspections and searches of individuals or conveyances seeking to cross our borders.'" 431 U.S. at 619 (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973)) (emphasis added).

Thus, the Court has consistently described the authority to conduct suspicionless border searches as an incident to a "routine" border inspection. Indeed, in Montoya de Hernandez, the Court explicitly found that the search conducted in that case was not routine, and required reasonable suspicion. 473 U.S. at 541; accord Molina-Tarazon, 279 F.3d at 712 ("[i]n order to conduct a search that goes beyond the routine, an inspector must have reasonable suspicion that the person to be searched may be carrying contraband") (citation omitted). The reasonable suspicion standard, the Court held, "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause." Id. Although Montoya de Hernandez does not address nonroutine searches of personal property, it does make clear that the constitutional and statutory authority to conduct

suspicionless border searches is not without limitation. See id.

In short, the Ninth Circuit's decision is entirely consistent with the holdings of at least three other Circuits and does not conflict with any decision of the Court. There is no contrary authority. Moreover, Montoya de Hernandez's recognition that the authority to perform suspicionless searches does not extend to nonroutine searches undermines the Solicitor General's proposed absolutist view of the border search doctrine.

B. The Court of Appeal Properly Held that the Disassembly and Removal of a Vehicle's Fuel Tank is a Nonroutine Search Requiring Reasonable Suspicion.

1. The Court of Appeals Properly Applied the Nonroutine Border Search Doctrine to this Particularly Invasive Type of Vehicle Search.

Just as the First, Fifth and Tenth Circuits correctly concluded that the highly intrusive searches of personal property in Robles, Rivas and Carreon were nonroutine, the Ninth Circuit properly characterized the disassembly of a vehicle gas tank and fuel system as nonroutine. As a threshold matter, the Solicitor General mischaracterizes the Molina-Tarazon opinion when he suggests that the Ninth Circuit "erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches." Pet. at 14; see also id. at 16. On the contrary, the Ninth Circuit cites the Court's cases explicating the border search doctrine as well as the same

statutory authority upon which the Solicitor General relies. See Molina-Tarazon, 279 F.3d at 712 (citing Montoya de Hernandez, 473 U.S. 531; Ramsey, 431 U.S. 606; Carroll v. United States, 267 U.S. 132 (1925); and 19 U.S.C. § 1581(a)).

In fact, Molina-Tarazon expressly considered the governmental interests at stake. Noting that the border search was authorized by the same Congress that proposed the Fourth Amendment, Molina-Tarazon observed that the "border search has a long history of judicial and public acceptance." Id. The Ninth Circuit also recognized that "routine searches of persons and their effects entering the country may be conducted without any suspicion whatsoever." Id. (citing Montoya de Hernandez, 473 U.S. at 537-38). The Ninth Circuit's reliance on these authorities makes clear that it was aware of the government's strong interest in policing the border.

Nonetheless, even "border searches are not exempt from the irreducible constitutional requirement of reasonableness." Id. Particularly disconcerting to the Molina-Tarazon court was the government's position that "the border search authority gives the government the right to dismantle a car with no reasonable suspicion whatsoever." Id. at 713.[3]

[3] Because the Solicitor General has taken the position that the nonroutine border search doctrine should be limited to highly intrusive searches of the person, Pet. at 12-13, the government's

> Were we to accept this argument, it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box. We think not. We hold, rather, that some searches of inanimate objects can be so intrusive as to be considered nonroutine.

Id.; accord Rivas, 157 F.3d at 367-68; Robles, 45 F.3d at 5; Carreon, 872 F.2d at 1442.[4]

2. The Facts of this Case Demonstrate that the Disassembly and Removal of Respondent's Fuel Tank was a Nonroutine Search.

The disassembly and removal of a fuel tank is a labor intensive, highly intrusive and potentially lengthy procedure that requires specialized labor, skills and tools, and the application of force upon a vital component of an automobile. See Pet. at 15 (it is the policy of the Customs Service to contract with mechanics to perform this duty, rather than to use its own employees). While the Solicitor General asserts that fuel tank searches are "quick and safe," Pet. at 15, and points out that the "*actual disassembly* of Respondent's gas tank took

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position in the instant case is identical to the position it took in Molina-Tarazon.

[4] Because the Court of Appeal's decision is the application of a properly stated existing rule of law and there is no inter-circuit conflict, this issue is not appropriate for the issuance of a writ of *certiorari*. See Rule 10 of the Rules of the Supreme Court of the United States ("A petition for a writ of certiorari will be granted only for compelling reasons" and will rarely be granted even when the asserted error consists of the "misapplication of a properly stated rule of law.").

only five to ten minutes." Pet. at 13, this characterization belies the highly intrusive nature of the procedure.

In this case, it took 20 to 30 minutes for the contract mechanic to arrive after he was called. See Pet., App. at 7a. The actual removal of the tank required the use of two hydraulic lifts (one to elevate the car and the other to lower the tank), and the application of force and special tools to disconnect hoses and electrical connections. Id. The disassembly of the tank took roughly ten to fifteen minutes. Id.

It then took the Customs inspector another five to ten minutes to hammer off the bondo on top of the tank and to remove the access plate. Id. at 8a. In total, roughly 35 to 55 minutes had elapsed between the time that the contract mechanic was contacted until the gas tank was opened. The record is silent as to how much time would have been required to re-connect the gas tank had no contraband been discovered. See Pet. at 13a. The need for the use of specialized labor, as well as the actual delay here and the potential for even greater delay, strongly suggest that the search was nonroutine.

Moreover, the factor analysis employed by the Ninth Circuit strongly supports its conclusion that the search was nonroutine. First, it relied on the fact that force was used to disassemble the gas tank. See Molina-Tarazon, 279 F.3d at 709 ("[These]

actions required the use of force and in their totality they raise the inference that this was not a routine search."). The use of force was also critical to the reasoning of the other Circuits that have applied the nonroutine search doctrine to searches of personal property. See, e.g., Rivas, 157 F.3d at 367 (agreeing with the First Circuit's conclusion that "'drilling into a closed, metal cylinder was not a routine search because force was used to effect the search,'" and concluding that "drilling into Rivas' trailer was a nonroutine search") (quoting Robles, 45 F.3d at 5).

The danger to the driver and passengers of the automobile, as well as the fear occasioned by the disassembly of the gas tank, are additional factors supporting the Ninth Circuit's determination that the search in Molina-Tarazon was nonroutine. 279 F.3d at 714-17. The Ninth Circuit supported its conclusion that a gas tank disassembly raises issues of danger with its common sense observation that "[a]n error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner." Id. at 715. The danger resulting from an accident involving a vehicle's fuel system is hardly "entirely speculative," as the Solicitor General suggests.

See Pet. at 15.[5] The possibility that a "fuel leak [could] cause[] a fire or explosion," Molina-Tarazon, 279 F.3d at 715, is a "point [that does not] require[] much documentation." Id. at 715 n.7.

Molina-Tarazon also took into account "whether the search is psychologically intrusive." Id. at 715-17. Citing several of the Court's cases emphasizing the fear engendered by law enforcement intrusions, the Ninth Circuit "conclude[d] that the search conducted here would make a reasonable driver -- one aware that a mechanic working for the government dismantled and reassembled a component critical to his vehicle's safe operation -- apprehensive about getting back into his vehicle and continuing on his way." Id. at 716. The Solicitor General dismisses such fears as "unreasonable" because they are not based on "empirical" evidence. Pet. at 15. Again, the danger associated with highly flammable gasoline can hardly be gainsaid. And not every motorist will blindly trust a mechanic that he or she did not choose, see Molina-Tarazon, 279 F.3d at 716, and whose work "leaves the normal driver unable to confirm whether

[5] The searches conducted in Rivas, Robles, and Carreon do not involve the sort of danger created by the disassembly of Respondent's fuel system. Therefore, the argument that the instant search is nonroutine is arguably stronger than the arguments accepted by the First, Fifth and Tenth Circuits.

everything is restored to its original state." Id. at 717.[6]

C. The Court of Appeal's Decision Does Not Threaten the Government's Ability to Police the Nation's Borders.

In addition to his assertion that the Ninth Circuit failed to consider the government's interests in random, suspicionless disassembly of gas tanks, the Solicitor General also provides a separate contention that the Ninth Circuit's decisions in Molina-Tarazon and the instant case will make it impossible for Customs and INS officials effectively to interdict drug and alien smuggling along the border. The inability of Customs and INS officials to conduct random searches of fuel tanks, reasons the Solicitor General, would compromise the security of the western United States by encouraging the increased use of gas tanks by drug and alien smugglers as well as by engendering a heightened risk of a terrorist attack. Pet. at 17-20.

The record does not support the Solicitor General's arguments. While the petition claims that Molina-Tarazon "deprives Customs officials of an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband," Pet. at 6, and that "[t]he authority to search gas

[6] In its discussion of the disadvantages of roving Border Patrol stops compared to fixed checkpoints, the Court noted that roving patrols were more likely to "frighten motorists," United States v. Ortiz, 422 U.S. 891, 894-95 (1975), but did not assert that it was reasonable for them to be frightened.

tanks without any level of suspicion is critical to the government's ability to deter and detect smuggling," id., the declarations submitted below do not bear out these claims.

To be sure, the declarations do reflect that Customs and INS officials would like to have the authority to conduct suspicionless disassemblies of gas tanks. See, e.g., Pet., App. at 12a (declaration of Director Ahern of the Customs Service). But far from establishing that such searches are "critical" or "an essential tool" of the Customs Service, Director Ahern fails to provide any evidence that Customs and Immigration inspectors conduct random and suspicionless fuel tank disassemblies and removals. See id. at 11a-13a. Nor does the declaration of Assistant Director Hinckley establish that INS has a policy of randomly undertaking the time consuming and labor intensive process of disassembling and removing a fuel tank. See id. at 15a-17a.

While the declaration of Assistant Director Hinckley states that "*inspectors often search* gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles," id. at 16a (emphasis added)), this declaration only says that inspectors conduct random searches. It does not say that those routine or random searches involve the disassembly and removal of fuel tanks and

makes no mention of the contract mechanics that are required under the government's own policies to perform this procedure.

While customs inspectors may conduct routine examinations or searches of fuel tanks without any level of suspicion, these examinations likely consist of narcotics detector dog screens, gas tank tapping, visual inspections and fiber optic scopes. See, e.g., Pet., App. at 4a (Declaration of Visente Garcia) (gas tank tap and dog alert before removal of tank in the instant case); Molina-Tarazon, 279 F.3d at 711-12 (dog screen, visual inspection and attempted use of fiber optic scope before removal of gas tank); United States v. Cedano-Arellano, 332 F.3d 568, 572 (9th Cir. 2003)(dog alert and gas tank tap before removal of tank). No evidence in the record suggests otherwise.

Similarly, there is no evidence before the Court that the disassembly and removal of a gas tank is the only practicable means of determining whether the tank contains contraband. The Solicitor General goes no further than to say that the "process [of removing the gas tank] *may* be the only practicable alternative for the government to determine whether the gas tank has been modified or altered." Pet. at 12 (citing Molina-Tarazon, 279 F.3d at 712 & nn. 2-3) (emphasis added). The declarations simply do not speak to which alternatives are practicable. Indeed, they do not establish that a gas tank

disassembly is ever the only practicable alternative.

Both Director Ahern and Assistant Director Hinckley speculate that the Ninth Circuit's decision in Molina-Tarazon will lead to an increase in the use of gas tanks in smuggling efforts and a decrease in the effectiveness of the efforts of Customs and INS to combat these activities. Pet., App. at 13a, 16a-17a. Their assertions are not supported by any evidence, statistical or otherwise.

This shortcoming is significant because of the decisions in Rivas and Carreon. In Rivas, the Fifth Circuit applied the nonroutine border search doctrine to a search of personal property: the inspector drilled into Rivas' camper. See 157 F.3d at 367. Thus, for over 5 years it has been the law of the Fifth Circuit -- which contains some of the nation's busiest ports of entry -- that reasonable suspicion must be established to support certain searches of personal property. Yet the government offered no evidence regarding the effect of the Rivas decision on the operations of the Customs Service and the INS in the Fifth Circuit.

Similarly, the Tenth Circuit, which also contains a border state, interpreted Montoya de Hernandez to "require[] a "particularized and objective basis" for a finding of "reasonable suspicion" to justify a nonroutine search in which an inspector

drilled into a camper wall. Carreon, 872 F.2d at 1443. Carreon was decided 15 years ago. Yet the government offered no evidence regarding the effect of the Carreon decision on the operations of the Customs Service and the INS in the Tenth Circuit. In short, if the government's ability to protect the border actually was significantly impaired by the recognition that the nonroutine search doctrine also applied to searches of personal property, then the government would have offered such evidence below. Its failure to do so suggests that the speculation offered in the declarations of Director Ahern and Assistant Director Hinckley do not merit the Court's review of the instant case.

Finally, the Solicitor General cites the apprehension of a would be terrorist who planned to detonate explosives at LAX airport as a basis for taking a narrow view of the Fourth Amendment rights of citizens entering this country. Pet. at 19. While Respondent certainly concedes that terrorist activity represents a grave threat to the Nation, no evidence offered below supports the view that the Ninth Circuit's decisions in Molina-Tarazon and the instant case, or the decisions in Rivas, Robles and Carreon, in any way circumscribe the Nation's ability to defend itself. Indeed, the declarations filed below do not even make this claim. The Solicitor General's invocation of the threat of terrorism is utterly without support on this record.

D. **Every Circuit Court that has Considered the Issue has Held that a Non-Routine Border Search Must be Supported by Reasonable Suspicion.**

The Solicitor General's fall-back position is that even if the disassembly and removal of the fuel tank from the vehicle Respondent was driving was a nonroutine search, the nonroutine search constitutes only a "minimal intrusion" and need not be supported by reasonable suspicion. See Pet. at 15-16. In advancing this counter-intuitive argument, the Solicitor General relies upon the Court's statement in Montoya De Hernandez that "[b]ecause the issues are not presented today, we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches." 473 U.S. at 541 n.4. Of course, that statement provides the Solicitor General with no support whatsoever; it merely indicates that the Court has not decided the issue. In fact, the Court's recognition that the reasonable suspicion standard "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause," suggests that the reasonable suspicion standard is proper under these circumstances. Id. at 541.

Moreover, application of the reasonable suspicion standard is certainly justified because the intrusion here was

hardly minimal. A vehicle search implicates two Fourth Amendment concerns, privacy interests and property interests. See United States v. Jacobson, 466 U.S. 96, 113 (1984) (The Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in property.").

More importantly, every Circuit court that has considered this issue has followed Montoya de Hernandez and held that if the search is nonroutine, then the applicable standard is reasonable suspicion. Rivas, 157 F.3d at 367 ("A [border] stop and search that is not routine requires a reasonable suspicion of wrongdoing to pass constitutional muster.")(internal quotation marks omitted); Robles, 45 F.3d at 5 ("The rule as to nonroutine border searches is [that] [t]here must be reasonable suspicion before a search can lawfully be conducted."); United States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir. 1994)("Although routine border searches may proceed without probable cause or justification, reasonable suspicion is required for the detention of a traveler at the border beyond the scope of a routine customs search and inspection.")(internal quotation marks omitted); United States v.

Johnson, 991 F.2d 1287, 1291 (7th Cir. 1993) "When a border search and seizure becomes nonroutine, a customs official needs reasonable suspicion to justify it." ; Carreon, 872 F.2d at 1440-42 (nonroutine border search justified on the basis of reasonable suspicion); United States v. Oyekan, 786 F.2d 832, 837 (8th Cir. 1986)(joining those circuits holding that a reasonable suspicion is required for strip and involuntary x-ray searches); see also Bradley v. United States, 299 F.3d 197, 203 (3d Cir. 2002)("While we have not had the occasion to address the question left open in Montoya de Hernandez - the level of suspicion, 'if any,' necessary to conduct at least certain types of nonroutine searches - those court of appeals that have done so agree that reasonable suspicion is required.")(internal citations omitted).

The striking unanimity of the Circuit Courts of Appeal on this question is founded upon plain common sense. Simply put, it would be utterly pointless to conduct an inquiry as to whether a border search is routine or nonroutine if no level of suspicion is required in either case. Moreover, the Court has already counseled against creating new Fourth Amendment standards, warning that "subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question." Montoya de Hernandez, 473 U.S. at 541. The many Courts of Appeal have correctly adopted the reasonable suspicion standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Dated: September 10, 2003

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-178

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

MANUEL FLORES-MONTANO,

RESPONDENT.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO | ss:

Margarita Gonzales, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court she served the within OPPOSITION TO THE UNITED STATES' PETITION FOR WRIT OF CERTIORARI on the counsel for PETITIONER by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to Theodore B. Olsin, Solicitor General of the United States, Department of Justice Washington, D.C. 20530-0001; and included an original and ten (10) copies to Hon. William K. Suter, Clerk United States Supreme Court, 1 First Street, NE Washington, D.C. 20530 and depositing same in the United States mails at San Diego, California on September 10, 2003.

MARGARITA GONZALES, Affiant

Subscribed and Sworn to before me
this 10th day of September 2003.

FRANCINA FERNANDEZ
COMM # 1361861
NOTARY PUB. CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. JUNE 22 2004

Notary Public in and for said
County and State.

Supreme Court, U.S.
FILED
SEP 26 2003
OFFICE OF THE CLERK

(3)

No. 02-1794

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 02-1794

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In opposing certiorari, respondent argues that the Ninth Circuit correctly held that customs officers at the border must have reasonable suspicion before searching a vehicle by removing and disassembling the vehicle's gas tank. He contends that other courts of appeals' decisions support that ruling. And he argues that the holding does not jeopardize the government's ability to protect the Nation's borders.

None of those arguments is sound. A constitutional holding that strips customs officers of the authority given by Congress to protect the Nation's borders from the illegal entry of contraband, persons, and harmful substances clearly merits this Court's attention. This Court's decisions support the government's authority to conduct a gas-tank disassembly without reasonable suspicion and no circuit has held to the contrary. And the court of appeals' holding has a significant and ad-

verse effect on law enforcement at the border. This Court's review is therefore warranted.

A. The Ninth Circuit's Decision Is Inconsistent With This Court's Decisions That Recognize The Broad Power Of Customs Officers To Conduct Suspicionless Searches Of Items At The Border

Respondent argues that the Ninth Circuit's decision accords with the principle recognized in *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985), that "[r]outine searches of the persons and effects of entrants [at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant," because, in his view, a gas tank search is nonroutine. Br. in Opp. 13-18. That position, however, conflicts with this Court's border search jurisprudence, which has consistently recognized the broad authority of customs officers to conduct suspicionless searches in order to safeguard the unique interest of the Nation in preventing the unlawful entry of persons and effects into this country. *Montoya de Hernandez*, 473 U.S. at 537; *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584-585 (1983); *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886).

Since the founding of this country, Congress has given customs officers plenary authority to conduct searches at the border, Pet. 8-11, and that authority continues to be conferred by 19 U.S.C. 1581(a), which provides that customs officers "may at any time [to] go on board of any vessel or vehicle * * * and examine, inspect, and search the vessel or vehicle *and every part thereof* * * * and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel

compliance." Thus, "[d]uring virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *United States* v. *Ross*, 456 U.S. 798, 820 n.26 (1982).

The plenary authority of customs officers to conduct border searches extends to the removal and disassembly of a vehicle's gas tank, a large and commonly used container for smuggling contraband and persons across the border. Pet. 17-18. In arguing that such searches are nonroutine, respondent erroneously equates (Br. in Opp. 12) such searches with the level of intrusiveness associated with the monitoring of a traveler's bowel movements involved in *Montoya de Hernandez*, 473 U.S. at 534-535, or the other nonroutine searches of the person identified in that decision, *i.e.*, "strip, body-cavity, or involuntary x-ray searches." *Id.* at 541 n.4. A gas tank search involves no similar exceptional intrusion on the vehicle's owner or its passengers. As explained in the petition, the removal, disassembly, and reassembly of a gas tank is a quick procedure that involves no permanent destruction of property and no interference with the safe operation of the tank or the vehicle. Pet. 13; see Pet. App. 8a (Declaration of J. Pesayco) ("The straps were undone, some bolts were unscrewed, and some hoses were disconnected. Nothing was permanently altered and nothing was damaged. * * * The gas tank could have been reconnected without damaging it or the vehicle.").

Respondent argues (Br. in Opp. 15) that a gas tank search is "highly intrusive" because there is delay occasioned by Custom's policy to contact a qualified mechanic to remove the tank from the vehicle. The pres-

ence of a mechanic to assist in a search of a vehicle, however, poses no intrusion on the vehicle's owner or passengers. There is also no lengthy or unreasonable delay associated with waiting for the arrival of a mechanic to safely remove the gas tank. See Pet. App. 7a (Declaration of J. Pesayco) (approximately 20-30 minute delay); *United States* v. *Molina-Tarazon*, 279 F.3d 709, 712 (9th Cir. 2002) (mechanic arrived within 15-20 minutes). Many inspections at the border may involve specially trained personnel or some incidental delay without converting the inspection into a nonroutine or highly intrusive event.

Nor does significant delay accompany the actual procedure, which in this case was completed within 15 to 25 minutes. Pet. App. 7a-8a. Although respondent faults (Br. in Opp. 16) the record for not containing specific statistics on the reassembly and reattachment of a gas tank where no contraband is found, there is no reason to believe that such a procedure entails lengthy delays. See Pet. App. 8a (Declaration of J. Pesayco) ("It was easy to disconnect the gas tank, and it would have been easy to connect it back again.").

Reiterating the Ninth Circuit's reasoning of *United States* v. *Molina-Tarazon*, 279 F.3d 709, 713 (2002), respondent also asserts that a gas tank search poses a risk of danger to the driver and passengers and is accompanied by fear. But respondent offers no more support for his contention than the pure speculation of the court in *Molina-Tarazon*, 279 F.3d at 713-716. And while overstating the purported intrusiveness of the commonplace mechanical procedure at issue in this case, respondent, like the court of appeals, gives insufficient weight to the strong interest of the government in preventing and detecting the smuggling across the border. Gas tanks are large opaque containers that commonly conceal the smuggling of illicit substances or aliens. The ability to conduct searches of such containers, without having to be able to satisfy a court in a later proceeding that reasonable suspicion existed, furthers the protective mission of United States officers at the border. That national interest outweighs the limited intrusion on the individual whose vehicle is subject to a search that does not affect the gas tank's safety or workability.

Respondent also is incorrect in suggesting that the government seeks the authority for customs officers to "order a car disassembled down to the last o-ring, and hand it back to the owner in a large box." Br. in Opp. 14 (quoting *Molina-Tarazon*, 279 F.3d at 713). Rather, the government contends that the removal, disassembly, and reassembly of a vehicle's *gas tank*, in order to detect a primary method of smuggling, is either a routine border search requiring no level of suspicion (Pet. 8-13) or, even assuming the procedure is nonroutine, may be conducted without suspicion given a balance of the competing interests at stake (Pet. 15-16). A gas tank is one of the few "containers" in a vehicle that is closed to visual inspection without being removed and that could be (and is) used to smuggle illegal items and persons.

B. No Court of Appeals Has Adopted The Ninth Circuit's Reasonable Suspicion Requirement For Gas Tank Searches

Respondent argues that the government's position is contrary to appellate decisions holding that officers at the border need reasonable suspicion to conduct a nonroutine search of property. Br. in Opp. 8, 10-13 (citing *United States* v. *Rivas*, 157 F.3d 364, 368 (5th Cir. 1998); *United States* v. *Robles*, 45 F.3d 1, 5 (1st Cir.), cert. denied, 514 U.S. 1043 (1995); *United States* v. *Car-*

reon, 872 F.2d 1436, 1441 (10th Cir. 1989)). Those cases are inapposite. Each of those decisions involved the intentional use of damaging force in the inspection of property, specifically, drilling into solid objects. *Rivas*, 157 F.3d at 366 (drilling into the frame of an ostensibly empty auto-transport trailer); *Robles*; 45 F.3d at 3 (drilling of a one inch hole into the center of a metal cylinder); *Carreon*, 872 F.2d at 1437-1438 (drilling a small hole in the camper shell of a pick-up truck). None of those decisions holds, much less suggests, that customs officers need reasonable suspicion to remove and disassemble a vehicle's gas tank in a manner that involves no intentional destruction of property.*

For similar reasons, respondent also errs (Br. in Opp. 9-11, 21-22) in suggesting that the decisions of *Rivas*, *Robles*, and *Carreon* have long limited the ability of customs officers to conduct gas tank searches at the border. Customs authorities have advised that officers regularly conduct gas tank searches involving the disassembly of a gas tank at border locations within the First, Fifth, and Tenth Circuits, and that those searches have proceeded on the assumption that no level of suspicion is required.

---

* The hammering off of the bondo from the gas tank is not comparable to drilling a hole into a vehicle or other object. Bondo is a putty-like hardening substance that is used as a sealant. Pet. 3. Its removal is comparable to cutting the string that ties a package or to pulling off a strip of packing tape. "[N]ew bondo could easily have been applied." Pet. App. 8a (Declaration of J. Pesayco).

C. A Requirement of Reasonable Suspicion Threatens To Impair The Government's Ability To Protect The Nation's Border

1. The Ninth Circuit's invalidation of the government's statutory authority to conduct suspicionless gas tank searches at the border warrants this Court's review not only because it is incorrect, but also because it impinges on an important authority to protect the Nation's international borders. "Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles," Pet. App. 12a (Declaration of J. Ahern), and gas tanks are regularly used for the smuggling of persons, Pet. 17-18.

Respondent seeks to diminish the significance of the question presented by arguing that the government has not demonstrated that customs or immigration inspectors regularly conduct suspicionless gas tank searches. Br. in Opp. 19-20. The ability of the government to conduct gas tank searches at the border, without reasonable suspicion, however, is critical to the government's ability to deter and detect smuggling in gas tanks. The existence of broad authority to conduct searches of gas tanks provides strong deterrence to potential smugglers who "would believe that gas tanks and other compartments, *as with other areas in a vehicle*, could be searched randomly and with no level of suspicion." Pet. App. 12a-13a (Declaration of J. Ahern) (emphasis added). By imposing a reasonable suspicion requirement for gas tank searches, when no such requirement exists to disassemble and search other opaque or locked vehicular compartments (such as luggage, trunks, glove compartments), the Ninth Circuit's decision poses a serious risk of actually encouraging smuggling through the use of gas tanks. Pet. 18-19.

Respondent does not dispute the government's submission that a requirement of reasonable suspicion could lead to fewer gas tank compartment area searches. Pet. 18-19. The Ninth Circuit's decision may chill officers from conducting gas tank searches when those officers believe that their grounds for suspicion may not pass muster with the courts. Cf. *Rivas.*, 157 F.3d at 368 (dog's "casting" in presence of vehicle did not provide reasonable suspicion to conduct search). Officers may also fear personal liability should a court later determine that the officers lacked reasonable suspicion. Given the extent to which alien and drug smuggling already routinely occurs in gas tanks, a decrease in gas tank searches, coupled with the lack of deterrence created by the authority to conduct suspicionless gas tank searches, significantly threatens the government's ability to detect the illegal entry of unwanted persons and things into this country.

2. Respondent suggests that customs officers may attempt to minimize the serious loss to border security caused by the Ninth Circuit's decision by using other alternatives to the removal and disassembly of the gas tank, such as dog screens, gas-tank tapping, visual inspections, and fiber optic scopes in order to detect the presence of contraband. Br. in Opp. 20-21. But none of those procedures is infallible, and they may not be as effective as the actual removal and disassembly of the tank itself, especially for the detection of alien smuggling. See *Molina-Tarazon*, 279 F.3d at 711-712 (noting failure of narcotics-trained dog to alert despite presence of marijuana in gas tank and blockage of fiber-optic scope by anti-siphoning valve in gas tank).

Respondent's contention also fails at a more fundamental level. This Court repeatedly has rejected the contention that the Fourth Amendment requires an ex-

amination into whether the government may employ less intrusive means to accomplish its objectives. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 350 (2001) ("a least-restrictive-alternative limitation * * * is * * * one of those * * * rules generally thought inappropriate in working out Fourth Amendment protection" (citation omitted)); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602, 629 n.9 (1989) (refusing to consider "a list of less drastic and equally effective means of addressing the Government's concerns") (internal quotation marks omitted); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557, n.12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."). Such inquiry also would be particularly inappropriate in the border security context, where the government's interest is at its apex. Because the Ninth Circuit's decision significantly impairs that interest and nullifies on constitutional grounds the statutory authority of customs officers to use an important tool to combat smuggling, this Court's review is warranted.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

SEPTEMBER 2003

Supreme Court, U.S.
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No. 02-1794

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion in order to remove, disassemble, and search a vehicle's gas tank for contraband.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The order of the district court (Pet. App. 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

2. Section 1581(a), Title 19, U.S.C., provides:

> Customs officers. Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well within his district, and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

STATEMENT

Respondent was charged with one count of unlawfully importing marijuana, in violation of 21 U.S.C. 952, 960; and one count of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court granted respondent's motion to suppress the marijuana that was seized from the gas tank of respondent's motor vehicle at the international border. Pet. App. 2a-3a. The court of appeals summarily affirmed. *Id.* at 1a.

1. On February 12, 2002, Customs Inspector Visente Garcia conducted an inspection of a 1987 Ford Taurus station wagon driven by respondent as he entered the Otay Mesa Port of Entry along the California border. As the inspector asked some questions, respondent avoided eye contact. Respondent's hand also was shaking as he handed the inspector his passport. The inspector tapped on the vehicle's gas tank with a screwdriver and noticed the tank sounded solid. The inspector was also informed that a narcotics detector dog had alerted to the vehicle. Respondent was then removed from the vehicle, and the vehicle was driven to a secondary inspection station.

At 4:20 p.m., Customs Inspector Jovita Pesayco at the secondary station inspected the gas tank by tapping it and observing a solid sound. He subsequently requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. That process took 10 to 15 minutes. After the gas tank was removed, Inspector Pesayco hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. That process took an additional 5 to 10 minutes. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. Pet. App. 4a-5a (Declaration of Visente Garcia, senior border inspector for the United States Customs Service); *id.* at 7a-9a (Declaration of Jovito Pesayco, senior border inspector for the United States Customs Service).

On February 27, 2002, respondent was indicted on one count of unlawfully importing approximately 37 kilograms of marijuana, in violation of 21 U.S.C. 952, 960, and one count of possession of that marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Relying on *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), respondent moved to suppress the marijuana uncovered from the gas tank. In *Molina-Tarazon*, a divided panel of the Ninth Circuit held that the removal of the gas tank is a nonroutine border search that requires reasonable suspicion. *Id.* at 713-

717. The court also held that, on the facts in that case, the officers had reasonable suspicion to conduct the search. *Id.* at 717-718.

In response to respondent's motion in this case to suppress evidence of the marijuana found during the gas tank search, the government advised the district court that it was not relying on reasonable suspicion as a basis for denying respondent's suppression motion, but that it believed that *Molina-Tarazon* was wrongly decided. The government contended that when a vehicle seeks to cross the border, 19 U.S.C. 1581(a) authorizes customs officers to "search the * * * vehicle and every part thereof," without any requirement of a warrant or particularized suspicion. The government also contended that "[t]his statute is coextensive with the Constitution." Gov't Response and Opp. to Defendant's Mot. to Suppress Evidence Based on Alleged Non-Routine Border Search 5. The government's response included as exhibits four affidavits concerning the removal of the gas tank in this case and the need to inspect vehicles by removing gas tanks in other cases. Pet. App. 4a-18a.

2. On June 19, 2002, the district court ordered the suppression of the drugs seized from respondent's gas tank. Relying on *Molina-Tarazon*, the court held that the search was nonroutine and therefore required reasonable suspicion. Pet. App. 3a. The court further found that "the Government has waived its right to rely on the alternative basis of reasonable suspicion, and * * * that, in this case, the Government has declined to establish reasonable suspicion." *Ibid.* The district court also found "that the facts set forth in the Government's declarations and motion exhibits are the facts in this case." *Ibid.*

3. On July 26, 2002, the government petitioned for initial hearing en banc, requesting the court of appeals to reconsider its decision in *Molina-Tarazon*. On March 14, 2003, the court of appeals issued an order summarily affirming the district court's judgment on the basis of *Molina-Tarazon*. Pet. App. 1a.

SUMMARY OF ARGUMENT

The disassembly and search of a vehicle's gas tank at the international border implicates the Nation's acute interest in protecting against the entry of unauthorized persons and contraband and constitutes a minimal intrusion on a traveler's property interests. Accordingly, such a search is reasonable under the Fourth Amendment without any requirement that government officials possess individualized suspicion.

A. Given the government's unique interest at the border, this Court has made clear that customs officials may conduct "routine" searches at the border without any level of suspicion. *United States* v. *Montoya de Hernandez*, 473 U.S. 521, 538 (1985). For certain highly invasive searches (such as x-rays, body-cavity, and strip searches of the person), the applicable level of suspicion depends on a balance of the competing interests at stake. *Id.* at 541. A gas tank search falls within the category of a routine search because it involves no extraordinary level of intrusion. But even if the Court were to regard a gas tank search as nonroutine, the balance of the government's and private interests leads to the conclusion that a suspicionless gas tank search at the border is reasonable.

B. The government has an overriding interest in maintaining territorial integrity at the international border. That interest encompasses not only the enforcement of the customs laws but also the need to

prevent the entry of contraband, illegal aliens, communicable diseases, harmful substances, and instruments of terrorism. It has long been settled that customs officials at the border may search, without particularized objective suspicion, an arriving person's clothing, pockets, shoes, purses, wallets, and baggage, as well as the person's vehicle. That broad authority also permits a complete and thorough search of vehicular compartments, such as the trunk and glove compartment.

Under those principles, the government may conduct suspicionless searches of a vehicle's gas tank, a relatively large container that is commonly used by smugglers to hide narcotics or aliens. Imposing a requirement of reasonable suspicion in order to conduct a gas tank search would remove a significant deterrent to illegal smuggling in gas tanks and could actually encourage such smuggling. Because other containers and vehicular compartments may be searched without any level of suspicion, smugglers may well shift to gas tanks as the preferred container to hide contraband. Similarly, a reasonable suspicion requirement would inevitably lead to fewer gas tank searches, with the resulting increased risk of illegal entry of unwanted items and persons into this Nation.

C. The historical antecedents to the statute authorizing suspicionless searches of conveyances, 19 U.S.C. 1581(a), make clear that the same Congress that adopted the Fourth Amendment regarded such searches as reasonable. The earliest customs laws "authorized customs officers to board and search vessels bound to the United States, and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in." *Maul* v. *United States*, 274 U.S. 501, 505 (1927); see Act of Aug. 4, 1790,

ch. 35, 1 Stat. 145. Similarly in 1799, Congress granted customs officials the plenary authority to search the baggage of persons seeking entry into the United States. Act of Mar. 2, 1799, ch. 22, § 46, 1 Stat. 662. The fact that Congress has long authorized suspicionless searches of conveyances and items at the border strongly supports the conclusion that customs officials may search, without reasonable suspicion, vehicular compartments, including gas tanks.

D. The government's essential interest in conducting gas tank searches outweighs the minimal intrusion imposed on the individual whose vehicle is subject to search. A gas tank search entails far less intrusion on privacy interests than the searches of personal items (such as clothing, wallets, purses, and luggage) that may be conducted at the border without any suspicion. The removal, disassembly, and reassembly of a vehicle's gas tank is a relatively brief procedure that can readily be performed without adversely affecting the safety or operation of the tank and vehicle.

E. The Ninth Circuit erred in *Molina-Tarazon* by imposing a requirement of reasonable suspicion. The court of appeals understated the government's interest and overstated the private interest at stake. A gas tank search is neither dangerous nor intrusive, and requires no more force than many common border searches. Accordingly, the Fourth Amendment does not require reasonable suspicion to conduct such searches.

ARGUMENT

A GAS TANK SEARCH AT THE BORDER WITHOUT REASONABLE SUSPICION IS CONSISTENT WITH THE FOURTH AMENDMENT

"Border searches, * * * from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Essential to the government's ability to protect the Nation from the entry of drugs, weapons, explosives, and unauthorized persons and things is the power to conduct searches of containers crossing an international border. "The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." *Id.* at 620. Under those long-standing principles, a search of the gas tank of a vehicle, without reasonable suspicion, is reasonable when conducted at the international border.

A. This Court's Decisions Recognize The Broad Power Of Customs Officers To Conduct Suspicionless Searches Of Items At The Border

This Court has made clear that the government has plenary authority to conduct routine searches at the border without any level of particularized suspicion. *Montoya de Hernandez*, 473 U.S. at 538 ("[r]outine searches of the persons and effects of entrants [at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant"). Particularly intrusive searches may fall outside of the category of a routine search, such that the applicable Fourth Amendment rule is one of reasonableness with the

required level of suspicion determined by balancing the government's "longstanding concern for the protection of the integrity of the border" against the individual's limited privacy expectations at the border. *Id.* at 538-540; see *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588-593 (1983) (conducting balancing test in upholding constitutionality of the suspicionless boarding of vessels by customs officials for document inspection).

In *Montoya de Hernandez*, the Court held that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." 473 U.S. at 541. The Court also stated that it was "suggest[ing] no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches." *Id.* at 541 n.4. The Court's opinion thus suggests that a search becomes nonroutine only when its level of intrusiveness equals or exceeds the type of highly invasive searches at issue and identified in *Montoya de Hernandez*. See *United States* v. *Ramos-Saenz*, 36 F.3d 59, 61 n.3 (9th Cir. 1994) ("[A] border search goes beyond the routine only when it reaches the degree of intrusiveness present in a strip search or body cavity search."); *United States* v. *Braks*, 842 F.2d 509, 512 n.5 (1st Cir. 1988) (noting that whether search involves a person or an object "may affect the threshold level of invasiveness at which a search is categorized as non-routine rather than routine").

Whatever the appropriate rule when a highly invasive search of the person occurs at the international border, a thorough search of a person's effects does not invoke a requirement of heightened suspicion before

the search can be deemed reasonable. A "routine" border search thus encompasses a thorough inspection of closed containers that are within or part of a vehicle. Such searches, since the early years of the Nation, have required no reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 537-538.

The search at issue here involves a container—the vehicle's gas tank—that smugglers often use to conceal contraband and aliens. The search poses a limited intrusion on the individual whose vehicle is subject to the search, and the search is certainly far less intrusive than the searches of the person characterized as non-routine in *Montoya de Hernandez*. A gas tank search therefore falls well within the scope of a routine border search. The routine character of a search is defined not by the frequency of its occurrence but by the nature and degree of its intrusiveness. *United States* v. *Cardenas*, 9 F.3d 1139, 1148 n.3 (5th Cir. 1993) ("Although the Supreme Court has never determined what makes a border search 'routine,' lower courts have generally classified routine searches as those which do not seriously invade a traveler's privacy."), cert. denied, 511 U.S. 1134 (1994). Simple removal and disassembly of a gas tank is not highly intrusive.

Alternatively, even if the definition of a routine search were thought not to embrace disassembly of closed containers attached to or part of a vehicle, such as a gas tank, the Fourth Amendment balance allows gas tank searches at the border without requiring reasonable suspicion. The government's ability to conduct thorough searches of vehicles at the border, without meeting a requirement of particularized suspicion, is essential to maintaining border security, and that important interest outweighs the modest intrusion on the individual privacy interests at stake.

B. A Suspicionless Gas Tank Search Is Justified By The Government's Interest In Inspecting All Vehicular Compartments In Which Contraband May Be Concealed

1. *The authority to conduct suspicionless border searches is intrinsic to sovereignty*

The government has a unique and vital interest in "protect[ing] the Nation by stopping and examining persons entering this country." *Montoya de Hernandez*, 473 U.S. at 538. That interest stems from the inherent authority of a sovereign to protect its territorial integrity and is reflected in the "broad, comprehensive powers" granted Congress "[t]o regulate Commerce with foreign nations." U.S. Const. Art. I, § 8, Cl. 3. *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125 (1973). It requires no "extended demonstration" to prove "[t]hat searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Ramsey*, 431 U.S. at 616.

The Court has long distinguished searches and seizures of vehicles within this country, which require probable cause, from border searches, which do not. As explained in *Carroll* v. *United States*:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country*

to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.

267 U.S. 132, 153-154 (1925) (emphasis added). Similarly, "[t]he authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry." *Torres* v. *Puerto Rico*, 442 U.S. 465, 472-473 (1979); see also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973) ("It is * * * without doubt that [the power to exclude aliens] can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders.").

"At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives." *Montoya de Hernandez*, 473 U.S. at 544; accord Pet. App. 11a (Declaration of Jayson P. Ahern, Director, Field Operations, for the Southern California Customs Management Center) (The "primary mission at Customs is ensuring border security, working on anti-terrorism initiatives, and interdicting drugs, contraband, and dangerous materials, while maintaining the smooth flow of legitimate travel and trade."). Congress has recently reaffirmed the close link between national security and border security by placing the government's border security and immigration enforcement responsibilities in the newly established Department of Homeland

Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2177 (charging agency with, *inter alia*, "[p]reventing the entry of terrorists and the instruments of terrorism into the United States," "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States," and "[c]arrying out * * * immigration enforcement functions").[1]

2. *The government has the authority to conduct suspicionless searches of closed containers within a vehicle crossing the border*

Consistent with the inherent sovereign authority to protect the Nation from the entry of unwanted items and persons, customs officials at the border may search, without reasonable suspicion, not only a person's outer clothing, pockets, shoes, wallets, purses, and baggage, *e.g.*, *United States* v. *Grotke*, 702 F.2d 49, 51 (2d Cir. 1983); *United States* v. *Sandler*, 644 F.2d 1163, 1169 (5th Cir. 1981) (en banc); *United States* v. *Carter*, 592 F.2d 402, 405 (7th Cir.), cert. denied, 441 U.S. 908 (1979); *United States* v. *Stornini*, 443 F.2d 833, 835 (1st Cir.), cert. denied, 404 U.S. 861 (1971), but also containers and concealed and opaque compartments within a vehicle where contraband may be found. "[I]t is too well established to require citation of authority that [border] searches are unique * * *. Thus every person

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[1] Customs officials face a formidable task in protecting our borders from the smuggling of unlawful items and aliens in vehicles. In Fiscal Year 2002, more than 129 million vehicles carrying more than 330 million passengers entered the United States through the ports of entry along the Nation's land borders. Dep't of Homeland Security, *National Workload Statistics* (visited Nov. 25, 2003) <http://www.cbp.gov/xp/cgov/toolbox/about/accomplish/national_workload_stats.xml>.

crossing our border may be required to disclose the contents of his baggage, and of his vehicle, if he has one. * * * Even 'mere suspicion' is not required." *Henderson* v. *United States*, 390 F.2d 805, 808 (9th Cir. 1967); accord *United States* v. *Sandoval Vargas*, 854 F.2d 1132, 1139 n.17 (9th Cir.) ("A border search [without reasonable suspicion] of a person or vehicle includes a search of any suitcases, packages, or other articles accompanying the person or contained within the vehicle."), cert. denied, 488 U.S. 912 (1988); *Molina-Tarazon*, 279 F.3d at 713 (border "searches of handbags, luggage, shoes, pockets and *the passenger compartments* of cars are clearly routine" and may be conducted without reasonable suspicion) (emphasis added).

The authority to search containers and concealed areas of a vehicle crossing the border reflects the practical reality that "[c]ontraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *United States* v. *Ross*, 456 U.S. 798, 820 (1982). "During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Id.* at 820 n.26. The government's authority to conduct thorough inspections at the border necessarily includes the authority to conduct a complete search of all places and containers within a vehicle where contraband may be stored.

3. The government has a special interest in searching gas tanks which are often used to conceal the illegal entry of drugs and aliens

The government's broad authority to search compartments and containers within vehicles crossing the border applies with particular force to gas tanks, which are one of the largest and most commonly used opaque containers for smuggling contraband and persons across the border. Over the last five and one-half years, approximately 25% of all drug seizures at land border crossings in the Southern California area arose from attempts to smuggle drugs in a vehicle's gas tank. During that period, there were 4619 drug seizures from gas tanks in the Southern California area alone. Pet. App. 12a (Declaration of Jayson P. Ahern). Along the California border, "[g]as tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles." *Ibid.* Customs officials also advise that the same fact is true along the entire southern border of the United States, with seizures from gas tanks representing over 25% of all narcotics seizures from fiscal year 2000 through fiscal year 2003.

Significantly, gas tanks represent a relatively sizeable compartment of a vehicle that criminals have modified or altered to smuggle not only large quantities of drugs, but also persons. As the Assistant Director for Inspectors for the San Diego District, Immigration and Naturalization Service, Diane Hinckley, has explained, "[i]nstances of persons smuggled in and around gas tank compartments are not uncommon at the ports of entry, averaging one approximately every ten days at [the] San Ysidro and Otay Mesa [ports of entry]." Pet. App. 16a. Such smuggling poses significant health and safety risks to the persons being smuggled. *Id.* at 16a-17a. "Because these cases occur regularly,

inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." *Id.* at 16a.

4. *A requirement of reasonable suspicion would undermine the government's interest in border security*

In the view of the Ninth Circuit, the disassembly of a gas tank of a vehicle to inspect for contraband—even when there is no other practicable means of determining what the gas tank contains—violates the Fourth Amendment unless customs officials possess reasonable suspicion that the gas tank conceals contraband. Such a rule deprives customs officials of an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband. Removal and disassembly of the gas tank is a highly effective means to search for contraband hidden within the tank. That process may be the only practicable alternative for the government to determine whether the gas tank has been modified or altered. *Molina-Tarazon*, 279 F.3d at 712 & nn.2-3 (noting the presence of manufacturer-installed anti-siphoning valve in gas tank that blocked the use of fiberoptic scope). And that process may be the most direct and efficient way to determine whether the tank is being used for smuggling. *Id.* at 712 (observing that dog failed to alert to marijuana hidden in gas tank). The government accordingly must have wide latitude to remove and, if necessary, to disassemble a vehicle's gas tank to deter and detect illegal smuggling into this country—which involves not only the smuggling of drugs and of aliens, but also of bombs, explosives, or other implements of terrorism that likewise may be concealed in gas tanks. *Infra*, p. 18.

5. *A requirement of reasonable suspicion could increase successful gas tank smuggling*

A requirement of reasonable suspicion would remove the significant deterrent effect of suspicionless searches and could actually encourage criminals to use gas tanks as a means of smuggling contraband. The power of customs officials to conduct random searches "is an important deterrent to smugglers using gas tanks and other compartments to smuggle contraband, because they would believe that gas tanks and other compartments, *as with other areas in a vehicle*, could be searched randomly and with no level of suspicion." Pet. App. 12a-13a (Declaration of Jayson P. Ahern) (emphasis added). The Ninth Circuit's decision poses a serious risk of affirmatively increasing the level of gas tank smuggling since would-be smugglers are likely to hide contraband in gas tanks rather than other compartments of the vehicle that are subject to inspection without any level of suspicion (such as luggage, trunks, and glove compartments).

A requirement of reasonable suspicion may also chill officers from conducting gas tank searches when those officers believe that their grounds for suspicion may not pass muster with the courts. Cf. *United States* v. *Rivas*, 157 F.3d 364, 368 (5th Cir. 1998) (dog's "casting" in presence of vehicle did not provide reasonable suspicion to conduct search). Officers may fear personal liability should a court later determine that the officers lacked reasonable suspicion. The resulting decrease in the frequency of gas tank searches and seizures thus poses a serious risk that gas tank smuggling will increase. As an Assistant Director for immigration inspectors noted in this case with respect to the smuggling of persons:

> To require reasonable suspicion for an INS inspector to search a gas tank compartment area * * * will likely result in fewer gas tank compartment area * * * searches, additional persons being successfully smuggled in gas tank compartment areas * * *, and more attempts to use gas tank compartment area * * * for alien smuggling. Smugglers detect weak points readily and exploit them. * * * Requiring reasonable suspicion to search gas tank compartment areas * * * could lead to gas tank compartments * * * becoming the preferred choice for alien smuggling in the Southern District of California.

Pet. App. 16a-17a (Declaration of Diane Hinckley).

The above analysis applies with equal force to the smuggling of narcotics and other hazardous substances into the United States. For example, customs officials recently intercepted one would-be terrorist, Ahmed Ressam, who entered the country by driving a vehicle across the border with explosives hidden in the trunk that he intended to detonate at LAX airport. *United States* v. *Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002). If a vehicle's trunk can be searched without reasonable suspicion but its gas tank cannot, it creates an appreciable risk of encouraging terrorists to use gas tanks as a means to avoid the detection of explosives or other hazardous substances crossing the country's borders. In short, a requirement of reasonable suspicion to conduct searches of one of the most commonly used vehicular compartments for concealing smuggled items would greatly impair the ability of the United States to deter, detect, and prevent the unlawful smuggling of dangerous items and persons across our borders.

Respondent argues (Br. in Opp. 19-20) that the government has not demonstrated that customs or immigration inspectors regularly conduct *suspicionless* gas tank searches. But the power to do so can serve as an effective deterrent, whether or not such searches occur frequently. In any event, the relative frequency of searches that are not prompted by particularized suspicion based on objective facts is not the test for determining whether customs officers can search without reasonable suspicion. Rather, the power to conduct searches without individualized reasonable suspicion derives from the unique border context where the sovereign's interest is at its apex. *E.g.*, *Ramsey*, 431 U.S. at 619 ("Import restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations.") (quoting *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. at 125). Thus, customs officials have blanket authority to conduct a thorough search of arriving passengers' baggage and the passenger compartments of vehicles, such as the trunk and glove compartment, whether or not the customs officials, as a practical matter, ordinarily conduct such inspection only when they suspect the presence of contraband. *Witt* v. *United States*, 287 F.2d 389, 391 (9th Cir.) ("That the customs authorities do not search every person crossing the border does not mean they have waived their right to do so, when they see fit."), cert. denied, 366 U.S. 950 (1961).

C. A Suspicionless Gas Tank Search Is Consistent With The Historical Plenary Statutory Power To Conduct Thorough Searches Of Items And Conveyances Crossing The Border

Not only do national sovereign interests justify, as reasonable under the Fourth Amendment, a suspicionless search of a gas tank, but the historical roots of the statute authorizing such searches confirm the compatibility of such searches with the Fourth Amendment. *Kyllo* v. *United States*, 533 U.S. 27, 40 (2001) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted.") (quoting *Carroll*, 267 U.S. at 149); accord *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 326 (2001).

1. *Customs officials have always had the plenary authority to conduct routine searches at the border*

The power of customs officials to conduct searches at the border has an "impressive historical pedigree." *Villamonte-Marquez*, 462 U.S. at 585. "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, 473 U.S. at 537; accord *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. at 125 ("Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry."). "It has always been understood that the sovereign had plenary power to control the introduction of contraband across its borders from abroad and to insure its physical security and protect its revenue by a thorough search of all persons and

chattels entering the country." Jules D. Barnett, *A Report on Search and Seizure at the Border*, 1 Am. Crim. L.Q., Aug. 1963, at 36, 39; accord *Lee* v. *United States*, 14 F.2d 400, 404 (1st Cir. 1926) ("It is the universal practice, and has always been recognized as lawful, for officers of the customs, at boundaries between this and contiguous nations, to stop travelers on foot or by vehicle crossing such boundary to examine and search to determine whether they and their effects may properly be permitted to enter the country. This authority has been exercised for national self-protection."), rev'd on other grounds, 274 U.S. 559 (1927).

The gas tank search in this case was authorized by 19 U.S.C. 1581(a), which states that customs officials "at any time may go on board of any vessel or vehicle * * * and examine, inspect, and search the vessel or vehicle and every part thereof * * * and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance." That statute derives from a statute passed by the First Congress, the Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 164, see *Villamonte-Marquez*, 462 U.S. at 584, which "authorized customs officers to board and search vessels bound to the United States, and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in." *Maul*, 274 U.S. at 505.

Section 31 of the 1790 Act permitted customs and revenue officers "to go on board of ships and vessels * * * for the purposes of * * * examining and searching the said ships or vessels," and provided that the officers "shall have free access to the cabin, and every other part of a ship or vessel" to seal and mark containers and packages that were to remain on the ship. 1 Stat. 164. The Act also gave customs officers the power to place inspectors on board ships "to examine the

cargo or contents" of ships entering the country, and authorized the seizure and forfeiture of goods upon violation of the Act. Act of Aug. 4, 1790, ch. 35, §§ 27, 28, 30, 50, 60, 70, 1 Stat. 163-164, 170, 174, 177. Because the 1790 Act was passed by the same Congress that promulgated the Fourth Amendment, "it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." *Ramsey*, 431 U.S. at 617 (quoting *Boyd* v. *United States*, 116 U.S. 616, 623 (1886)).[2]

The statutory authority conferred by 19 U.S.C. 1581(a) is plenary and entitles customs officials to search, without suspicion, concealed and opaque compartments, such as the vehicle's gas tank, where contraband is often secreted. The fact that Section 1581(a)'s antecedents reach back to the Nation's origins further supports the conclusion that it is compatible with the Fourth Amendment.

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[2] In *Ramsey*, this Court observed that the earliest customs statute, Act of July 31, 1789, ch. 5, 1 Stat. 29, was passed two months before Congress proposed the Bill of Rights and contained an "acknowledgment of plenary customs power" to conduct warrantless inspections of vessels. *Ramsey*, 431 U.S. at 616; accord *Montoya de Hernandez*, 473 U.S. at 537. The 1789 Act granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed"; in contrast, searches of any "particular dwelling-house, store, building, or other place" were authorized with a warrant upon "cause to suspect." § 24, 1 Stat. 43. That provision was carried forward in the Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 170, and is distinct from the separate authority of customs to conduct suspicionless searches of articles and effects when presented for entry at the border.

2. The authority to conduct suspicionless gas tank searches is also supported by the historical authority to conduct suspicionless searches of luggage

The plenary authority conferred by Section 1581(a) is also consistent with other similar grants of long-standing statutory power to conduct thorough searches of luggage, another type of container that may conceal the unlawful entry of items into the country. Shortly after the adoption of the Fourth Amendment, Congress granted customs officials the plenary authority to search the baggage of persons entering the country in order to ensure the payment of appropriate duties on imported goods. Act of Mar. 2, 1799, ch. 22, § 46, 1 Stat. 662 (authorizing a customs official, "whenever the collector * * * *shall think proper so to do*," "to direct the baggage of any person arriving within the United States, to be examined") (emphasis added).[3]

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[3] Today, such authority is conferred by, *inter alia*, 19 U.S.C. 1461, which provides:

> All merchandise and baggage imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at which the same shall arrive; and such officer may require the owner, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open the same for inspection, or to furnish a key or other means for opening the same.

See also 19 U.S.C. 1496 ("The appropriate customs officer may cause an examination to be made of the baggage of any person arriving in the United States."); 19 U.S.C. 1582 ("all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents").

"The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be." *Ross*, 456 U.S. at 823; accord *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion of White, J.) ("Customs officers characteristically inspect luggage * * * ; it is an old practice and is intimately associated with excluding illegal articles from the country."); *Von Cotzhauzen* v. *Nazro*, 107 U.S. 215, 218 (1882) ("[A]ll the vexatious and annoying machinery of the custom-house, and the vigilance of its officers, are imposed by law to prevent even the smallest evasion" of the revenue laws.). The long-standing right of customs officers to conduct random searches of baggage and luggage of persons crossing the border supports the similarly broad authority of customs officers to conduct suspicionless searches of closed containers within the vehicle, including the gas tank, where smuggling frequently occurs.[4]

[4] The earliest customs statute that was directed to vehicles authorized customs officials to "stop, search, and examine any vehicle, beast, or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law." Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 232; *Carroll*, 267 U.S. at 151; *Ross*, 456 U.S. at 806 n.7; cf. *supra*, note 2. That authority now resides in 19 U.S.C. 482, which the lower courts have held to authorize searches at the border to be conducted without regard to reasonable suspicion. *Sandoval Vargas*, 854 F.2d at 1139; *Sandler*, 644 F.2d at 1169.

D. Gas Tank Searches Involve A Minimal Intrusion On Individual Interests

The removal, disassembly, and reassembly of a gas tank only minimally intrudes on the privacy interest of the individual whose vehicle is subject to the search at the border. People do not store personal items, other than fuel (and illegal contraband), in gas tanks, and a search of a fuel tank does not entail any personal embarrassment or indignity. Cf. *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."). Indeed, the privacy interests implicated in a search of a vehicle's gas tank would appear to be far less than those implicated by border "searches of handbags, luggage, shoes, pockets, and the passenger compartments of cars" (*Molina-Tarazon*, 279 F.3d at 713)—searches that are considered routine and may occur at the border without any level of suspicion. See also *ibid.* ("Object searches certainly do not cause the same degree of personal indignity as searches of the human body.").

The procedure involved in a gas tank search also involves no extraordinary intrusion on either the individual or his vehicle. The disassembly and removal of a gas tank is a relatively easy and straightforward procedure that may be readily performed by automobile mechanics.[5] The disassembly of respondent's gas tank

[5] See, *e.g.*, http://www.pelicanparts.com/techarticles/914_gas_tank_remove/914_ gas_tank_remove.htm (visited Nov. 25, 2003) ("removing and repairing the tank is an easy task"); http://www.c3sharktank.com/tech2/rear4.html (visited Nov. 25, 2003) ("Removal of the gas tank is a fairly easy process."); http://www. forwardlook.net/mail-archive/msg07778.html (visited Nov. 25, 2003) ("Pulling the tank is straightforward."); http://www.1inamillioncars.

in this case was completed within 15 to 25 minutes. Pet. App. 5a, 7a-8a.

The procedure also involved no destruction of the gas tank and was reversible by reassembling the tank. As the inspector who performed the procedure in this case testified:

> At most, my hammering off the bondo [from the tank] slightly scratched and possibly slightly dented the gas tank, but the gas tank was just as workable as it was before I removed the bondo. The gas tank was not damaged as far as safety and workability were concerned. This did damage the bondo, but new bondo could easily have been applied. * * *
>
> The force used to lower the gas tank was not damaging. The straps were undone, some bolts were unscrewed, and some hoses were disconnected. Nothing was permanently altered and nothing was damaged. I have witnessed this procedure hundreds of times in my five years of working as a border inspector. It was easy to disconnect the tank, and it would have been easy to connect it back again. The gas tank could have been reconnected without damaging it or the vehicle.

Pet. App. 8a; see also *Molina-Tarazon*, 279 F.3d at 712 ("The mechanic hoisted the truck onto a lift and removed several bolts and straps that connected the tank to the truck, disengaging electrical connections and hoses in the process. The mechanic then removed the sensing unit, revealing thirty-one packages of marijuana inside the tank."); *id.* at 719 (Brunetti, J.

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com/mb/1960sCarsArticles/gastankremoval.html (visited Nov. 25, 2003) ("The whole job shouldn't take more than ½ hour, it is easy.").

concurring) ("The search at issue here is an example of the simple disassembly of a gas tank in the ordinary course of inspection. * * * This inspection was conducted in a matter of 10-15 minutes with no permanent alteration or resulting harm to Molina-Tarazon's vehicle."). Although the tank here was not immediately reconnected upon discovery of the drugs, in cases where "no contraband is discovered, it is Customs' policy to reassemble and reinstall any gas tanks that are disassembled during a border search." Pet. App. 13a (Declaration of Jayson P. Ahern).

Respondent argues (Br. in Opp. 15) that a gas tank search is "highly intrusive" because there is delay occasioned by the policy of customs officials to contact a qualified mechanic to remove the tank from the vehicle. The presence of a mechanic to assist in a search of a vehicle, however, poses no intrusion on the vehicle's owner or passengers. There is also no lengthy or unreasonable delay associated with waiting for the arrival of a mechanic to safely remove the gas tank. See Pet. App. 7a (Declaration of Jovito Pesayco) (mechanic arrived within 20-30 minutes); *Molina-Tarazon*, 279 F.3d at 712 (mechanic arrived within 15-20 minutes). Many inspections at the border may involve specially trained personnel or some incidental delay without converting the inspection into a nonroutine or highly intrusive event. *E.g.* Pub. L. No. 107-296, § 421, 116 Stat. 2182; President's Reorganization Plan, H.R. Doc. No. 32, 108th Cong., 1st Sess. 4 (2003) (transferring agricultural inspectors to Bureau of Customs and Border Protection).

"Consistently * * * with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the

international border than in the interior." *Montoya de Hernandez*, 473 U.S. at 538. Accordingly, "not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck must more favorably to the Government at the border." *Id.* at 539-540; see also Note, *From Bags to Body Cavities: The Law of Border Search*, 74 Colum. L. Rev. 53, 56 (1974) ("Since, ostensibly, all travelers may be uniformly searched, no opprobrium attaches to the execution of this search. * * * Moreover, the traveler stands on notice that he will be searched."). As demonstrated, the intrusion on the individual whose vehicle is subject to a gas tank search is limited. The individual interest in avoiding that intrusion is outweighed by the government's paramount and well-established interest in protecting the border from the entry of unwanted items and effects that may be concealed in vehicular compartments.

E. The Ninth Circuit's Analysis Is Flawed

In holding that the removal and disassembly of a gas tank was a nonroutine search requiring reasonable suspicion, the Ninth Circuit in *Molina-Tarazon* erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches of a vehicle's gas tank. Rather, the court of appeals reasoned that "[t]hree aspects of the search here render it nonroutine: Force was used to remove and disassemble the fuel tank; the procedure involved some risk of harm; and someone whose vehicle was subjected to a search is likely to feel a diminished sense of security." 279 F.3d at 713. Reliance on each of those factors was flawed, and they do not support the conclusion that the suspicionless removal and disassembly of a gas tank is unreasonable.

1. The use of force in a gas tank search does not justify a requirement of reasonable suspicion

The Ninth Circuit critically erred in relying on the fact that a gas tank search requires "the use of tools" and "the use of force" in the removal of the tank from the vehicle. *Molina-Tarazon*, 279 F.3d at 714. The only force involved in a gas tank search is the nondestructive removal and disassembly of the tank, and that procedure can easily be reversed upon completion of the search without any effect on the tank's safety or operation. *Supra*, pp. 25-26. In the most basic of border searches, customs officers must often use force, such as removing packing tape from a box or prying open a crate.

It is also unrealistic to expect customs officials to discharge their duties in protecting the border without the broad ability to engage in some acts of disassembly. "For example, if the lock is jammed on a suitcase or its owner refused to present a key, [customs] agents have to employ some degree of force to gain access to its interior." *Molina-Tarazon*, 279 F.3d at 714; see also 19 U.S.C. 1461 (requiring person at border upon request to "open * * * for inspection" any "trunk, traveling bag, sack, valise, * * * other container, or * * * closed vehicle," or "to furnish a key or other means for opening the same"); 19 U.S.C. 1581(a) (authorizing customs officials to "use all necessary force to compel compliance").

Customs officials likewise face a wide variety of other circumstances in which disassembly may be necessary to conduct a complete search of a vehicle or vessel. *E.g. United States* v. *Flores*, No. 98-50288, 1998 WL 746085, at **1 (9th Cir. Oct. 20, 1998) (162 F.3d 1170) (Table)

(border search involving use of screwdriver to dismantle a stereo speaker in trunk of car); *Hammond* v. *United States*, 356 F.2d 931, 932 (9th Cir. 1966) (border search involving car air filter that secreted heroin); *King* v. *United States*, 348 F.2d 814, 816 (9th Cir.) (border search involving specially-built trunk compartment that concealed amphetamine), cert. denied, 382 U.S. 926 (1965); see also Joel Millman, *On Trips to Mexico, Some Americans Bring Back Mexicans*, Wall St. J., Nov. 17, 2003, at A1 (reporting that in one recent weekend, "border officials pulled 130 people from trunks, door panels and under the seats of various vehicles. On Friday, officials caught * * * two would-be immigrants hidden under the hood of his truck. On Saturday, inspectors pulled a man from a Pontiac Grand Prix in which the gas tank had been removed to create a "clavo," or secret compartment."). Customs officials also advise that they commonly find, only after some use of force or disassembly, contraband hidden in secret compartments in vehicular trunks, doors, seats, dashboards, floorboards, and spare tire compartments. A rule that the use of force triggers a requirement of reasonable suspicion would encourage smugglers to conceal their contraband in vehicular compartments or containers that are not easily opened for inspection, with unacceptable adverse consequences to border security.

2. *The Ninth Circuit's belief that a gas tank search poses a danger is without foundation*

The court of appeals also reasoned, that in its view, "the procedure involved some risk of harm," because "[a]n error in removing, disassembling and then reassembling the portion of a vehicle that contains a highly flammable and potentially explosive substance

like gasoline might well result in disastrous consequences for the vehicle's owner." *Molina-Tarazon*, 279 F.3d at 713, 715. The court of appeals' perception of the safety risks associated with the removal, disassembly, and reassembly of the gas tank, however, is entirely speculative. The court pointed to no reported instance of any mechanical error, much less an accident, associated with a gas tank search.

Nor is Customs aware of any such instance. Gas tank searches occur several hundred times a year in Southern California alone. *Infra*, p. 15. Customs officials advise that, although most searches of gas tanks reveal the presence of contraband or aliens, some negative searches result. In fiscal year 2003, for example, 348 gas tank searches conducted along the Southern border were negative; the tanks were reassembled; and the vehicles involved continued their entry into the United States. Moreover, Customs informs us that such services are performed under contract by qualified mechanics who are employed as regular mechanics in Southern California by other employers.

3. *A gas tank search is not psychologically intrusive*

The court of appeals also found a gas tank search to be "psychologically intrusive," because the court believed that an individual subjected to such a search would experience fear or a "diminished sense of security" associated with driving a "potentially unsafe" motor vehicle reassembled by a mechanic not chosen by the individual. *Molina-Tarazon*, 279 F.3d at 713, 715, 716. As discussed, the procedure is straightforward and performed only by qualified mechanics. Finally, given the absence of any empirical basis for concluding that gas tank searches pose a danger to the driver of the vehicle or its passengers, any fear occasioned by

being informed of a gas tank search would be unreasonable. See *id.* at 719 (Brunetti, J., concurring) ("The risk of negligent reassembly or replacement may create fear that would never be overcome in any circumstances, including the simplest dismantlement.").

Accordingly, the rationale of the Ninth Circuit is unsupported factually and legally. The quick, safe, and nondestructive removal of a gas tank is well within the parameters of a thorough inspection that international travelers should reasonably anticipate when seeking entry into this country.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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IN THE

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UNITED STATES OF AMERICA,
Petitioner,

v.

MANUEL FLORES-MONTANO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The Ninth Circuit Court of Appeals' opinion is not reported. *United States' Pet. for a Writ of Cert.* ("Pet.") App. at 1a. The district court's opinion is also not reported. *Id.* at 2a-3a.

JURISDICTION

On March 14, 2003, the Ninth Circuit entered its judgment. Pet. App. at 1a. The government has invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). Pet. at 1.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

A. Facts

1. The Search of Respondent's Vehicle Was Not Routine: a Contract Mechanic Completely Dismantled the Vehicle's Fuel System.

On February 12, 2002, at 4:20 p.m., Respondent attempted to enter the United States at the Otay Mesa Port of Entry in Southern California as the driver of a 1987 Ford Taurus station wagon. Pet. App. at 7a. Customs Inspector Visente Garcia asked Respondent several "routine border inspection questions," which Respondent answered. *Id.* at 4a. Respondent avoided eye contact. *Id.* When Respondent handed Inspector Garcia his permanent resident alien card and his driver's license, Respondent's hand was shaking. *Id.*

Inspector Garcia tapped on the gas tank with his screwdriver. Pet. App. at 4a. He "noticed that the fuel tank sounded solid." *Id.* In addition, a narcotics detector dog alerted to the vehicle. *Id.* at 4a, 7a. Respondent was ordered out of the vehicle and taken to the security office. *Id.* at 4a. Customs inspectors drove the car to the secondary inspection area for a thorough inspection. *Id.*

In secondary inspection, Senior Customs Border Inspector Jovito Pesayco also tapped the gas tank and "it sounded solid" to him. Pet. App. 7a. He was informed of the narcotic detector dog's alert and he called a contract mechanic to come to the port of entry to disassemble the vehicle's fuel

system. *Id.* at 4a, 7a. After approximately 20 to 30 minutes, the mechanic arrived. *Id.* Senior Inspector Pesayco took the car to a hydraulic lift where the mechanic elevated it. *Id.*

Senior Inspector Pesayco observed the disassembly and noted that it was performed in a manner similar to that detailed in *United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002). *See* Pet. App. at 8a-9a. In *Molina-Tarazon*,

> [t]he mechanic hoisted the [vehicle] onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and the sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by unscrewing the pump unit and removing the "bushing" which held the tank to the [vehicle]. All of those actions required the use of force. . . .

Molina-Tarazon, 279 F.3d at 714. Senior Inspector Pesayco further described the mechanic as "us[ing] force and tools." Pet. App. at 7a. It took approximately ten to fifteen minutes for the mechanic successfully to lower the gas tank on a second, portable lift. *Id.* at 8a. The mechanic did not reassemble the vehicle. *See id.*

After the contract mechanic lowered the tank, Senior Inspector Pesayco noticed bondo on top of it. Pet. App. at 8a. In five to ten minutes, he hammered off the bondo, revealing an access plate underneath. *Id.* The inspector's hammering scratched and "possibly slightly dented" the tank. *Id.* He opened the access plate and found approximately 37 kilograms of cellophane-wrapped packages containing marijuana. *Id.*

2. The Declarations Submitted by the Government Below Did Not Establish That the Search Conducted Here Was Reasonable.

In an effort to demonstrate that the authority randomly to disassemble vehicles at the border is "essential" to border

security, the government submitted several declarations to the district court. Jayson P. Ahern, Director, Field Operations, for the Southern District of California Customs Management Center,[1] reports that close to 25% of all drug seizures at the Southern California ports of entry have been gas tank seizures. Pet. App. 11a-12a. Although Director Ahern states that "searches" of gas tanks are "routine," *id.* at 12a, he does not claim that disassembly of fuel systems is "routine." *See id.* Similarly, although he believes it is "very important that Customs continues to have the ability to conduct random and suspicionless searches for drugs in gas tanks and other compartments of vehicles at the border," *id.*, he does not claim that Customs conducts "random and suspicionless" disassemblies of gas tanks. He does not address the numerous other investigative techniques that inspectors may randomly perform that do not require vehicle disassembly. *See infra* at 40-41; *see also* U.S. Customs Service, *America's Frontline: Performance and Annual Report Fiscal Year 2002* 17-18, 30, 32, 34-35 (emphasizing non-intrusive inspection techniques) ("*Customs' Annual Report*").

Director Ahern speculates that "[r]equiring reasonable suspicion for compartment searches involving necessary damaging force would result in an increase in compartment smuggling of drugs, contraband, and other dangerous materials." Pet. App. at 13a. He does not support his *ipse dixit* with any statistics or other evidence, even though federal courts in other border districts have ruled that such searches are nonroutine searches requiring reasonable suspicion for many years. *See, e.g.*, *United States v. Rivas*, 157 F.3d 364, 368 (5th Cir. 1998); *United States v. Carreon*, 872 F.2d 1436, 1440-42 (10th Cir. 1989).

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[1] The declarations were filed before the creation of the Department of Homeland Security.

The Declaration of Diane Hinckley, Assistant Director for Inspections, Immigration and Naturalization Service ("INS"), San Diego District, reports that gas tanks are used for smuggling undocumented aliens into the United States, and that the use of such smuggling techniques is "not uncommon." Pet. App. 15a-16a. Like Director Ahern, she claims that "inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." *Id.* at 16a. But, also like Director Ahern, she makes no claim that inspectors routinely dismantle gas tanks—without suspicion—as part of these efforts. *See id.* at 15a-18a.

Nor does she claim that the "search[es] of gas tank areas" that inspectors "often" perform are gas tank disassemblies. *See* Pet. App. at 16a. Given that Customs contracts with mechanics to perform fuel system disassemblies, Pet. at 15, the searches to which Assistant Director Hinckley refers—the ones that she advises are conducted by inspectors—are unlikely to involve gas tank disassembly.

Indeed, when a gas tank is employed in alien smuggling, as opposed to drug smuggling, the gas tank cannot serve its function: while marijuana like that found in Respondent's case may be wrapped in cellophane and allowed to float in the fuel, people cannot be concealed in an operating gas tank. As Assistant Director Hinckley notes, vehicles used for this purpose must be modified:

> As part of the vehicle's modification, gasoline is sometimes siphoned into the motor from a plastic bottle in the engine or from a specially built small tank in the trunk. . . .

Pet. App. at 16a-17a. Inspectors need not disassemble a vehicle's fuel system to discover "a plastic bottle in the engine" from which fuel is siphoned or "a specially built small tank in the trunk." In fact, Assistant Director Hinckley does not claim that the sort of disassembly undertaken in

Respondent's case, as opposed to the sort of inspections conducted by border inspectors, has ever resulted in the discovery of people being smuggled in a gas tank. *See id.* at 15a-18a.

Assistant Director Hinckley also offered her opinion—unsupported by any statistics—that "[r]equiring reasonable suspicion to search gas tank compartment areas and other compartments could lead to gas tank compartments and other compartments becoming the preferred choice for alien smuggling in the Southern District of California." Pet. App. at 16a-17a. Not only does Assistant Director Hinckley not specify that she is referring to the sort of gas tank disassembly undertaken in the instant case, she offers no evidence that these smuggling techniques have "becom[e] the preferred choice for alien smuggling" in those districts that have recognized a reasonable suspicion requirement for nonroutine searches of inanimate objects for several years. *See id.* at 15a-18a.

B. Proceedings Below

On February 27, 2002, the grand jury for the Southern District of California indicted Respondent on two counts, charging importation of approximately 37 kilograms of marijuana in violation of 21 U.S.C. §§ 952 and 960 and possession of the same with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

On June 7, 2002, Respondent filed a motion to suppress the fruits of the nonroutine border search of the vehicle. On June 20, 2002, the district court entered an order suppressing the evidence. *See* Pet. App. at 2a-3a. Relying upon *Molina-Tarazon*, the district court held that the search of the fuel tank was a nonroutine search requiring reasonable suspicion and that the government had both declined to establish reasonable suspicion and "waived its right to rely on the alternative basis of reasonable suspicion." Pet. App. at 3a. The Solicitor

General agrees that the government did not rely on reasonable suspicion as a basis for denial of the motion. Brief for the United States ("B.U.S.") at 4.

On June 20, 2002, the government filed a Notice of Appeal to the Ninth Circuit Court of Appeals. On July 26, 2002, it petitioned that court to convene an en banc panel to reconsider *Molina-Tarazon*. On March 14, 2003, the Court of Appeals issued a summary affirmance of the district court's judgment. Pet. App. at 1a.

SUMMARY OF ARGUMENT

The Solicitor General argues that any person who returns to the United States in a vehicle risks disassembly of that vehicle at the unfettered discretion of a low-level Customs or Immigration inspector. Disassembly of a motor vehicle for no reason whatsoever, even at the border, is not "reasonable" under the Fourth Amendment.

In *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985), the Court held that the detention of a traveler at the border "beyond the scope of a routine customs search and inspection," must be supported by reasonable suspicion. Subsequent to *Montoya de Hernandez*'s reaffirmation that routine border searches are reasonable under the Fourth Amendment, every Circuit that has addressed the "nonroutine border search doctrine" in the context of searches of property has held that certain especially intrusive searches of inanimate objects are nonroutine, and that such searches must be supported by reasonable suspicion. In *Molina-Tarazon*, the Ninth Circuit Court of Appeals adopted this long-held, unanimous view.

The Solicitor General now argues that the several Courts of Appeals have erred in finding that some highly intrusive searches of personal property at the border are not routine and therefore are unreasonable under the Fourth Amendment

unless supported by reasonable suspicion. While it is true that the government has wide powers of search and seizure at the border, those powers are not unlimited and are subject to the Fourth Amendment's requirement of reasonableness. The Court's cases have never extended the border search exception to searches and seizures such as that conducted here, which involves the disassembly of a vehicle's fuel system rather than a search of a closed container.

The Solicitor General argues that because revenue inspectors were allowed to search ships at the time of the framing, history somehow supports his view that low-level government officials enjoy the authority to undertake disassemblies of modern-day conveyances without any reasonable suspicion. He provides no authority, however, for the proposition that these revenue inspectors had the power to disassemble the vessels they inspected. Nor does he cite any historical materials indicating that searches and seizures of conveyances involving forcible disassembly were considered reasonable at the time the Fourth Amendment was adopted. Rather, the historical record indicates that highly intrusive searches of vessels were considered unreasonable.

Moreover, balancing a traveler's privacy and property interests against the government's interest in conducting suspicionless disassemblies of vehicles strongly favors the traveler. First, travelers enjoy substantial privacy and property interests in their vehicles that are compromised when government officials and their employees disassemble their vehicles. Indeed, the Courts of Appeals have unanimously recognized those interests in finding that highly intrusive vehicle searches at the border must be supported by reasonable suspicion. Second, as recognized in *Molina-Tarazon*, disassembly of the fuel system of a motor vehicle involves the risk of harm and serves to diminish the operator's sense of security in the vehicle.

The Solicitor General argues that the ability to undertake suspicionless disassemblies of vehicles is "essential to maintaining border security," B.U.S. at 10, and warns of "unacceptable adverse consequences to border security." *Id.* at 30. The Solicitor General's claims are not supported by the record. First, he does not dispute Respondent's argument that the government has not demonstrated that Customs or Immigration inspectors regularly conduct the suspicionless gas tank disassemblies which are supposedly "essential to maintaining border security." There is no evidence that the day-to-day practices of these agencies have been disturbed by the modest requirement of reasonable suspicion recognized in the Courts of Appeals.

Second, none of the evidence offered below demonstrates that the mission of the various border inspectors has in any way been compromised in those Circuits that applied the nonroutine search doctrine to inanimate objects prior to the Ninth Circuit's decision in *Molina-Tarazon*. In fact, the applicability of the nonroutine border search doctrine to personal property was recognized at least 15 years ago in the Tenth Circuit, and at least 5 years ago in the Fifth Circuit. Although these two Circuits contain ports of entry that are as busy as those in Southern California, the government offered no evidence at all of negative consequences in those Circuits. Third, the Solicitor General ignores the fact that border inspectors already conduct highly effective vehicle inspections that do not require vehicle disassembly.

ARGUMENT

A. Routine Searches Performed at the Border Require No Level of Suspicion, but the Nonroutine Search and Seizure Here—the Disassembly of a Vehicle's Fuel System—Must Be Supported By Reasonable Suspicion.

The Court has held that "*[r]outine* searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant. . . ." *Montoya de Hernandez*, 473 U.S. at 538 (emphasis added) (footnote omitted). Similarly, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court observed that the power to exclude aliens may "be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders." *Id.* at 272 (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925) and *Boyd v. United States*, 116 U.S. 616 (1886)). *United States v. Ramsey*, 431 U.S. 606 (1977), characterizes the border search doctrine similarly: "it was 'without doubt' that the power to exclude aliens 'can be effectuated by *routine* inspections and searches of individuals or conveyances seeking to cross our borders.'" *Id.* at 619 (emphasis added) (citation omitted).

Thus, the Court has consistently described the authority to conduct suspicionless border searches as an incident to a "routine" border inspection. In *Montoya de Hernandez*, the Court explicitly found that the detention in that case was not routine and required reasonable suspicion. 473 U.S. at 541; *accord Molina-Tarazon*, 279 F.3d at 712 ("In order to conduct a search that goes beyond the routine, an inspector must have reasonable suspicion that the person to be searched may be carrying contraband.").[2] The reasonable suspicion

[2] "[T]he distinction between 'routine' and 'nonroutine' turns on the level of intrusiveness of the search," *Molina-Tarazon*, 279 F.3d at 713, rather than its frequency. Thus, the government's claim below that disassembly of fuel systems is "not . . . infrequent," Pet. App. at 12a, is beside the point.

standard, the Court held, "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause." *Id.*; *accord Delaware v. Prouse*, 440 U.S. 648, 656 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975). Although *Montoya de Hernandez* does not address nonroutine searches of personal property, it makes clear that the constitutional and statutory authority to conduct suspicionless searches and seizures at the border is not unlimited. *See id.*

Nor does the border search exception's foundation in national sovereignty insulate that doctrine from the Fourth Amendment's reasonableness requirement. "The border search exception is grounded in the recognized right of the sovereign to control, *subject to substantive limitations imposed by the Constitution*, who and what may enter the country." *Ramsey*, 431 U.S. at 620 (emphasis added); *see also Marsh v. United States*, 344 F.2d 317, 324 (5th Cir. 1965) ("Border searches are . . . not exempt from the constitutional test of reasonableness."). Thus, the Solicitor General's heavy emphasis on national sovereignty, *see, e.g.*, B.U.S. at 11, begs the question: regardless of the incidents of sovereignty, the issue remains whether the disassembly of a vehicle's fuel system in the absence of any suspicion whatsoever is reasonable under the Fourth Amendment.

B. The Courts of Appeals Have Properly Held that Particularly Intrusive Searches and Seizures of Personal Property, Such As the Search and Seizure Here, Are Nonroutine and Unreasonable Under the Fourth Amendment Unless Supported By Reasonable Suspicion.

By concluding that the disassembly of Respondent's vehicle's fuel system was not a routine search, *see Molina-*

Tarazon, 279 F.3d at 717, the Ninth Circuit joined at least three other Circuits that have recognized that certain particularly intrusive searches of personal property are not routine. In fact, every Circuit to address the issue holds that nonroutine searches and seizures of inanimate objects must be supported by reasonable suspicion. *See Rivas*, 157 F.3d at 367 ("drilling into Rivas' trailer was a nonroutine search"); *United States v. Robles*, 45 F.3d 1, 5 (1st Cir. 1995) (noting that "[t]he government concedes that drilling a hole in the cylinder was nonroutine," and holding "[w]e have little difficulty concluding that drilling a hole into the cylinder was not a routine search")[3]; *Carreon*, 872 F.2d at 1441-42 (finding that drilling a hole in defendant's camper shell was "justified on the 'reasonable suspicion' standard articulated in *Montoya de Hernandez*")[4]; *see also United States v. Alfonso*, 759 F.2d 728, 738 (9th Cir. 1985) ("[E]ven in the context of a border search, the search of private living quarters on a ship should require something more than naked suspicion."). Thus, the Ninth Circuit's holding that certain highly intrusive

[3] *Amici Curiae* Washington Legal Foundation and Allied Educational Foundation ("*Amici*") suggest that *Robles* is not persuasive because the government conceded that the search in that case was not routine. *Amici* at 12 n.6. Obviously, the government's concession in that case is strong evidence that the Solicitor General's absolutist position in the instant case—he seems to suggest that no search of personal property can ever be nonroutine, *see* B.U.S. at 9-10—is ill-founded. At any rate, the opinion makes clear that the First Circuit agreed that the destructive search in that case was nonroutine and that it required reasonable suspicion. *See Robles*, 45 F.3d at 5.

[4] *Amici* also misread *Carreon*, claiming "the court never specifically addressed whether 'reasonable suspicion' was required." *Amici* at 12 n.6. To the contrary, *Carreon* observed that the "'reasonable suspicion' standard" was "applicable." *See* 872 F.2d at 1441 (disagreeing with the district court's refusal to permit the prosecutor to elicit the searching inspector's experience in other seizures because that "line of inquiry . . . goes to the heart of the applicable 'reasonable suspicion' standard").

border searches and seizures of personal property require reasonable suspicion enjoys unanimous support.[5]

Even though the Fourth Amendment protects the people from "unreasonable" searches and seizures of their "persons" *and* their "effects," U.S. Const. amend. IV, the Solicitor General argues that no search or seizure of personal property can ever be nonroutine and therefore unreasonable in the absence of reasonable suspicion.

> Whatever the appropriate rule when a highly invasive search of the person occurs at the international border, a thorough search of the person's effects does not invoke a requirement of heightened suspicion before the search can be deemed reasonable. A "routine" border search thus encompasses a thorough inspection of closed containers that are within or part of a vehicle. *Such searches*, since the early years of the Nation, have required no reasonable suspicion.

B.U.S. at 9-10 (emphasis added) (citing *Montoya de Hernandez*, 473 U.S. at 537-38). Nothing in *Montoya de Hernandez* indicates that intrusions involving destruction or disassembly of personal effects were included among "such

[5] Although the Solicitor General previously cited *United States v. Nieves*, 609 F.2d 642 (2d Cir. 1979), *see* Pet. at 12, *Nieves* is not inconsistent with *Molina-Tarazon*, *Rivas*, *Robles* and *Carreon*. Rather, appellant Nieves argued only that the "search of his *person* went beyond a routine border search. . . ." 609 F.2d at 645 (emphasis added). Specifically, Nieves contended that the removal and search of his shoes was a "strip search," subject to the "reasonable suspicion standard." *Id.* at 645-46. Because Nieves did not raise the issue of the applicability of the nonroutine search doctrine to personal property, the *Nieves* Court did not consider whether the drilling of holes in Nieves' shoes was a destructive, and therefore nonroutine, search of property, as opposed to a "strip search" of his person.

searches."[6] Surely a border inspector cannot smash a vase to view its contents or employ a torch to open up a vehicle's quarter panel; there must be limits.[7]

Not only is the Solicitor General's view that personal property merits no protection at the border contrary to the decisions of four Courts of Appeals, it also cannot be reconciled with fundamental Fourth Amendment values. "'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.'" *Boyd*, 116 U.S. at 627 (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765)). Indeed, it is beyond dispute that "the [Fourth] Amendment protects property as well as privacy." *Soldal v. Cook County*, 506 U.S. 56, 62 (1992). Allowing low-level border inspectors carte blanche to intrude on property rights, even at the border, cannot be reconciled with this fundamental Fourth Amendment interest. *See Prouse*, 440 U.S. at 653-54 ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'") (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)) (internal quotations, citation, footnotes omitted); *see also McDonald v. United States*, 335 U.S. 451, 456 (1948) ("Power is a heady thing; and history shows that the police acting on their own cannot be trusted.").

[6] The Solicitor General offers no historical evidence that destructive searches or disassemblies of conveyances were permitted at common law. *See infra* at 24-32.

[7] *Amici* concede that some searches of inanimate objects at the border may violate the Fourth Amendment. *Amici* at 16 n.8.

Thus, the Ninth Circuit properly rejected the government's argument that "the border search authority gives the government the right to dismantle a car with no reasonable suspicion whatsoever," *Molina-Tarazon*, 279 F.3d at 713, because "border searches are not exempt from the irreducible constitutional requirement of reasonableness." *Id.* at 712; *accord Ramsey*, 431 U.S. at 620-21; *Marsh*, 344 F.2d at 324.

> Were we to accept [the government's] argument, it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box. We think not. We hold, rather, that some searches of inanimate objects can be so intrusive as to be considered nonroutine.

Id. at 713; *accord Rivas*, 157 F.3d at 367-68; *Robles*, 45 F.3d at 5; *Carreon*, 872 F.2d at 1441-42. Ultimately, then, the question is not whether *any* border searches and seizures of personal property are unreasonable under the Fourth Amendment, but rather *which* of such searches and seizures are unreasonable. The analyses of the First, Fifth, Ninth and Tenth Circuits provide the framework to answer that question.[8]

1. *Molina-Tarazon* Properly Took Into Account the Government's Interest in Policing the Border and the Court's Cases Analyzing That Interest.

The Solicitor General mischaracterizes the *Molina-Tarazon* opinion, upon which the Court of Appeals relied in

[8] It is noteworthy that the Fifth, Ninth and Tenth Circuits—the Courts of Appeals that cover the entire southwest border with Mexico—are all supportive of Respondent's position. *See Almeida-Sanchez*, 413 U.S. at 295 (White, J., dissenting) (the border courts "perhaps have a better vantage point than we here on the Potomac to judge the practicalities of border-area law enforcement and the reasonableness of official searches of vehicles to enforce the immigration statutes").

Respondent's case, when he suggests that the Ninth Circuit "erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches of a vehicle's gas tank." B.U.S. at 28. To the contrary, the Ninth Circuit cites the Court's cases explicating the border search doctrine as well as the same statutory authority upon which the Solicitor General relies. *See Molina-Tarazon*, 279 F.3d at 712 & n.4 (citing *Montoya de Hernandez*, 473 U.S. 531; *Ramsey*, 431 U.S. 606; *Carroll*, 267 U.S. at 154; and 19 U.S.C. § 1581(a)).

Molina-Tarazon expressly considered the governmental interests at stake. Noting that the border search was authorized by the same Congress that proposed the Fourth Amendment, *Molina-Tarazon* observed that the "border search has a long history of judicial and public acceptance." 279 F.3d at 712. It also recognized that "routine searches of persons and their effects entering the country may be conducted without any suspicion whatsoever." *Id.* (citing *Montoya de Hernandez*, 473 U.S. at 537-38). The Ninth Circuit's reliance on these authorities makes clear that it was well aware of the government's strong interest in policing the border.

2. The Disassembly and Removal of Respondent's Fuel Tank was a Nonroutine Search.

The disassembly and removal of a fuel tank is a labor intensive, highly intrusive and potentially lengthy procedure that requires specialized labor, skills and tools, and the application of force upon a vital component of an automobile. In this case, it took 20 to 30 minutes for the contract mechanic to arrive after he was called. *See* Pet. App. at 7a. The actual removal of the tank required the use of two hydraulic lifts (one to elevate the car and the other to lower the tank), and the application of force and special tools to disconnect hoses and electrical connections. *Id.* Disassembly of the tank took roughly ten to fifteen minutes. *Id.*

It then took an inspector another five to ten minutes to hammer off the bondo from on top of the tank and to remove the access plate. *Id.* at 8a. In total, nearly an hour had elapsed between the time that the contract mechanic was contacted until the gas tank was opened. The record is silent as to how much time would have been required to re-connect the gas tank had no contraband been discovered. *See id.* at 13a. The need for the use of specialized labor, as well as the actual delay here and the potential for even greater delay, strongly suggest that the search was nonroutine.

While the First,[9] Fifth[10] and Tenth[11] Circuits easily concluded that the destructive searches in those cases were nonroutine and required reasonable suspicion, the Ninth Circuit employed a careful analysis of several factors in determining that a search and seizure similar to that undertaken here was not routine. *See Molina-Tarazon*, 279 F.3d at 713-17; *see also id.* at 713 n.5 ("These happen to be the factors relevant in our case. We do not rule out the possibility that other factors, such as protracted delay in completing the search, may render a search nonroutine."). The multi-factor analysis employed in *Molina-Tarazon* strongly supports the Court of Appeals' conclusion that the search here was nonroutine.

First, *Molina-Tarazon* relied on the fact that force was used to disassemble the gas tank.

> The search of Molina's truck involved the use of tools. The mechanic hoisted the truck onto a lift, loosened the straps holding the tank to the chassis, disconnected the filler and sending hoses, detached electrical connections, disengaged the fill neck and unscrewed the bolts. He then detached the tank itself by

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[9] *See Robles*, 45 F.3d at 5.

[10] *See Rivas*, 157 F.3d at 368.

[11] *See Carreon*, 872 F.2d at 1441-42.

> unscrewing the pump unit and removing the pressed in 'bushing' which held the tank to the truck. All of these actions required the use of force and in their totality they raise the inference that this was not a routine search.

279 F.3d at 714. The use of force was also critical to the reasoning of the other Circuits that have applied the non-routine search doctrine to searches of personal property. *See, e.g.*, *Rivas*, 157 F.3d at 367 (agreeing with the First Circuit's conclusion that "'drilling into a closed, metal cylinder was not a routine search because force was used to effect the search'") (quoting *Robles*, 45 F.3d at 5); *see also United States v. Braks*, 842 F.2d 509, 511-12 & nn.5-12 (1st Cir. 1988) (cataloguing factors relevant to the analysis of a nonroutine search and including "whether force is used to effect the search" as a relevant factor).

The Solicitor General rejects the inference drawn by the various Courts of Appeals, arguing that "[i]n the most basic of border searches, customs officers must often use force, such as removing packing tape from a box or prying open a crate." B.U.S. at 29. His observation is beside the point; everyone expects that a box or crate will be opened at some point: they are merely the media in which other items are shipped. But no one buys a car expecting that his or her fuel system will ever be "opened." Thus, the extensive use of force in this context, as when destructive force is applied in drilling into a vehicle or other item, is neither expected nor welcome. It is not routine.[12]

In addition to his attempt to draw an analogy between a box and a vehicle's fuel system, the Solicitor General relates

[12] By way of illustration, it is very common for two individuals who do not know each other to greet one another with a handshake, a "routine" application of force. Application of the same amount of force, to a different part of the body, would not be "routine."

that "Customs officials also advise[13] that they commonly find, only after some use of force or disassembly, contraband hidden in secret compartments in vehicular trunks, doors, seats, dashboards, floorboards, and spare tire compartments." B.U.S. at 30. The Customs officials' experiences do not in any way undercut the Ninth Circuit's analysis: *Molina-Tarazon* holds that the use of force is a relevant factor in determining whether a search is nonroutine, not that it is the only factor. *See* 279 F.3d at 713-14. The fact that some searches involving force have been successful—and Respondent knows nothing about them, including whether these extra-record seizures were supported by reasonable suspicion—simply does not speak to whether the searches were routine or reasonable under the Fourth Amendment.

Finally, the Solicitor General argues that consideration of the use of force in the analysis of whether a search is routine will have a direct effect on smugglers' strategic choices. "A rule that the use of force triggers a requirement of reasonable suspicion would encourage smugglers to conceal their contraband in vehicular compartments or containers that are not easily opened for inspection, with unacceptable adverse consequences to border security." B.U.S. at 30.

The Solicitor General's argument suffers from numerous flaws. First, the Ninth Circuit has not adopted the rule he posits: the use of force is but one factor to consider; *Molina-*

[13] The Solicitor General's reliance on communications outside the record is improper. *See Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 n.3 (1986) ("This argument, however, was not presented in the state courts, and appears to rest in large part on facts not part of the record before us. Because this Court must affirm or reverse upon the case as it appears in the record . . . , we have no occasion to consider the argument here. Nor is it appropriate, as a matter of good judicial administration, for us to consider claims that have not been the subject of factual development in earlier proceedings.") (citing *Russell v. Southard*, 53 U.S. 139, 159 (1851)) (additional citation omitted).

Tarazon does not hold that "the use of force triggers a requirement of reasonable suspicion." *See Molina-Tarazon*, 279 F.3d at 713-17. Second, there is no reason to believe that a modest reasonable suspicion requirement for the disassembly of a vehicle's fuel system will prompt changes in the way smugglers do business: they hardly need additional motivation to conceal contraband. As the Court recognized over 20 years ago in *United States v. Ross*, 456 U.S. 798 (1982), "[c]ontraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some kind of container." *Id.* at 820.[14]

Finally, if the consideration of force as a factor in the analysis of border searches actually caused "unacceptable adverse consequences to border security," the government could have offered evidence of these consequences below. The First, Fifth and Tenth Circuit's holdings in *Robles*, *Rivas*, and *Carreon*—all of which emphasize the forcible nature of the searches involved—have provided years of experience from which the government could have offered proof to back up the Solicitor General's speculations as to the effect of considering the use of force in evaluating whether a border search is "routine."[15] Despite the fact that rules emphasizing

[14] The Solicitor General cites this passage in his brief. *See* B.U.S. at 14.

[15] Both Director Ahern and Assistant Director Hinckley specifically address searches involving "necessary damaging force," Pet. App. at 13a, 16a—exactly the sort of intrusion addressed in *Robles*, *Rivas*, and *Carreon*—yet they provide no evidence supporting their claims that a reasonable suspicion requirement would result in "an increase in compartment smuggling of drugs, contraband, and other dangerous materials," Pet. App. at 13a, and that "fewer gas tank and other compartment searches" would occur. *Id.* at 16a. In his reply to Respondent's Opposition to the Petition for a Writ of Certiorari ("Pet. Reply"), the Solicitor General went outside the record to claim that "Customs authorities have advised that officers regularly conduct gas tank searches involving the disassembly of a gas tank at border locations within the First, Fifth, and Tenth Circuits, and that those searches have proceeded on the assumption that no level of suspicion is required." Pet. Reply at 6. Not only is their "assumption" contrary to the reasoning of *Robles*, *Rivas*, and *Carreon*, reliance on this extra-record information is improper. *See Witters*, 474 U.S. at 488 n.3. But even if that extra-record information is accurate, it does not change the fact that the declarations offered by Director Ahern and Assistant Director Hinckley reach the very searches that *Robles*, *Rivas*, and *Carreon* addressed—ones involving destructive force—and they still offered no evidence whatsoever to support their claims. The lack of supporting evidence for those claims suggests that all of their arguments, those regarding searches and seizures involving destructive force and those involving disassembly of fuel systems, are purely speculative.

the use of force have been in place in three other Circuits for many years, the government failed to offer any such evidence below.

The danger to the driver and passengers of the automobile, as well as the fear occasioned by the disassembly of the gas tank, are additional factors supporting the Ninth Circuit's determination that the search in *Molina-Tarazon* was nonroutine. 279 F.3d at 714-17; *accord Braks*, 842 F.2d at 512 & n.10 ("whether the type of search exposes the suspect to pain or danger" is relevant to whether a search was routine). The Ninth Circuit supported its conclusion that a gas tank disassembly raises issues of danger with its common sense observation that "[a]n error in removing, disassembling and then reassembling the portion of a motor vehicle that contains a highly flammable and potentially explosive substance like gasoline might well result in disastrous consequences for the vehicle's owner." *Id.* at 715. The danger resulting from an accident involving a vehicle's fuel system is hardly "entirely speculative," as the Solicitor General suggests. *See* B.U.S. at 30-31. The possibility that a "fuel leak [could] cause[] a fire or explosion," *Molina-*

Tarazon, 279 F.3d at 715, is a "point [that does not] require[] much documentation." *Id.* at 715 n.7.[16]

Molina-Tarazon also took into account "whether the search is psychologically intrusive." *Id.* at 715-17. Citing several of the Court's cases emphasizing the fear engendered by law enforcement intrusions, the Ninth Circuit "conclude[d] that the search conducted here would make a reasonable driver—one aware that a mechanic working for the government dismantled and reassembled a component critical to his vehicle's safe operation—apprehensive about getting back into his vehicle and continuing on his way." *Id.* at 716.

The Solicitor General dismisses such fears as "unreasonable" because they are not based on "empirical" evidence. B.U.S. at 31-32. Again, the danger associated with highly flammable gasoline can hardly be gainsaid. And not every motorist will blindly trust a mechanic that he or she did not choose, *see Molina-Tarazon*, 279 F.3d at 716, and whose work "leaves the normal driver unable to confirm whether everything is restored to its original state." *Id.* at 717.[17] Such caution is not unreasonable.

Moreover, the Solicitor General's denigration of the fear likely to be visited upon innocent drivers—and the Solicitor General admits that in fiscal year 2003 there were 348 gas tanks disassembled that contained nothing but fuel[18]—runs contrary to this Court's Fourth Amendment jurisprudence,

[16] The Solicitor General argues that trained mechanics can "readily" perform fuel system disassemblies. B.U.S. at 25 & n.5. He does not dispute, however, that the results of an error in that process may be quite serious. *Cf.* Joe Sego, Gas Tank Removal and Replacement, http://www.ifsja.org/tech/fuel/gastank.shtml (last visited Dec. 30, 2003) (gas tank removal "can be a serious hazard to you and your truck").

[17] Nearly everyone is familiar with the expression "close enough for government work."

[18] *See* B.U.S. at 31.

which takes into account the fear occasioned by law enforcement intrusions, reasonable or not. *See, e.g.*, *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975) (roving patrols were more likely to "frighten motorists"); *Prouse*, 440 U.S. at 657 (roving stops "may create substantial anxiety"). Thus, *Molina-Tarazon*'s consideration of the fear engendered by the instant intrusion as a single factor in its analysis is well supported in the Court's cases.

3. The Court of Appeals Correctly Concluded that the Search Here Was Not Routine and Was Unreasonable Because It Was Not Supported By Reasonable Suspicion.

The government, of course, bears the burden of demonstrating the applicability of an exception to the protections of the Fourth Amendment. *See United States v. Jeffers*, 342 U.S. 48, 51 (1951), *overruled on other grounds*, *Rakas v. Illinois*, 439 U.S. 128 (1978); *accord Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). Based upon its analysis of the various factors supporting an inference that the search was not routine, the Court of Appeals correctly found that the routine border search exception did not apply, and the disassembly of the fuel system required reasonable suspicion. *See Molina-Tarazon*, 279 F.3d at 713-17.[19] The Court's cases establishing that the border search exception applies to routine searches and seizures fully support the Court of Appeals' conclusion. *See Montoya de Hernandez*, 473 U.S. at 538; *Almeida-Sanchez*, 413 U.S. at 272; *Ramsey*, 431 U.S. at 619.

[19] The government waived the right to argue reasonable suspicion below. Pet. App. at 3a. It is bound by that waiver. *See Brignoni-Ponce*, 422 U.S. at 886 n.11.

C. The Solicitor General's Historical Analysis Does Not Demonstrate That Searches Involving the Destruction or Disassembly of Property Were Considered Reasonable at the Time of the Adoption of the Fourth Amendment.

1. Introduction

"In reading the [Fourth] Amendment, [the Court is] guided by 'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. . . .'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995)). The Solicitor General's argument relies heavily on the search authority described in some of the earliest customs statutes, particularly one passed in 1790 addressing searches of ships. B.U.S. at 20-24. Those statutes, however, do not reflect any analysis of destructive searches and seizures, nor do they address the disassembly of conveyances. In fact, the earliest statutes suggest that the first Congress limited the most intrusive searches of ships to situations where customs officials had individualized suspicion. Nor do those statutes authorize the use of force necessary to disassemble a conveyance.

The Solicitor General's theory that customs inspectors were granted broad authority to undertake searches and seizures involving damage to or disassembly of property such as ships conflicts with the historical evidence of the colonists' objections to highly intrusive searches of vessels. Moreover, he fails to address that conflict by offering any evidence that such searches and seizures were permissible under the common law.

2. The Customs Statute Passed In 1790 Does Not Suggest that Suspicionless Searches and Seizures Involving Destruction of Property and Disassembly of Conveyances Were Considered Reasonable.

The Court has frequently noted that various customs statutes authorizing warrantless intrusions of one sort or another were passed close in time to the adoption of the Fourth Amendment, and it has relied on that temporal proximity to support its constitutional analyses in those cases. *See, e.g.*, *United States v. Villamonte-Marquez*, 462 U.S. 579, 584-85 (1983); *Ramsey*, 431 U.S. at 616-18; *Carroll*, 267 U.S. at 149-51; *Boyd*, 116 U.S. at 623. Attempting to extend that authority, the Solicitor General argues that the instant intrusion must be constitutional because the authority upon which the officers rely, 19 U.S.C. § 1581(a), derived from a statute passed by the first Congress, the Act of Aug. 4, 1790 ("1790 Act"), ch. 35, § 31, 1 Stat. 145, 164. B.U.S. at 21.[20] Indeed, *Villamonte-Marquez* observed that the latter statute "appears to be the lineal ancestor" of the former. *See* 462 U.S. at 584-85.

In *Villamonte-Marquez*, the Court analyzed whether a suspicionless boarding of a vessel for a document inspection was constitutional. *See id.* at 584 n.3. The 1790 Act authorized precisely that sort of boarding. *See id.* at 584 (citing 1 Stat. at 164). As a result, the Court reasoned that "the enactment of this statute by the same Congress that promulgated the constitutional amendments that ultimately

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[20] Neither section 1581(a), nor the other vehicle search statutes, *see* 19 U.S.C. §§ 482, 1461, explicitly authorize disassembly of a vehicle. In fact, section 1461 contemplates opening a "closed vehicle" with a key. *See* 19 U.S.C. § 1461.

became the Bill of Rights gives the statute an impressive historical pedigree." *Id.* at 585.[21]

The Solicitor General's analogy breaks down, however, because while the 1790 Act clearly authorized the entry challenged in *Villamonte-Marquez*, *see* 1790 Act, § 31, 1 Stat. at 164 (authorizing officials "to go on board ships or vessels . . . for the purpose of demanding manifests . . ."), the 1790 Act did not explicitly authorize searches and seizures involving destruction of property or disassembly of it. Thus, an inference that the first Congress necessarily thought that an intrusion similar to that in the instant case was constitutional—if it can be drawn at all—is far weaker than the similar inference the Court drew in *Villamonte-Marquez*. The fact that the first Congress could not have anticipated the existence of the fuel system dismantled here further undermines the Solicitor General's argument.[22]

The Solicitor General's historical argument is also flawed because the provision he relies on does not authorize intrusive searches. Section 31 of the 1790 Act permits officials to board vessels

> for the purposes of demanding the manifests . . . , and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of a ship or vessel: and if any box, trunk, chest, cask, or other package, shall be found

[21] *Ramsey*, 431 U.S. at 616-18; *Carroll*, 267 U.S. at 149-51; and *Boyd*, 116 U.S. at 623, considered a different statute passed by the first Congress, the Collection Act of July 31, 1789, 1 Stat. 29.

[22] The Solicitor General's inference is also weaker than that drawn in *Villamonte-Marquez* because the statute he cites relates to searches of ships, and he provides no evidence that the first Congress equated ships with other conveyances. *See* William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* 1548-49 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) ("*Cuddihy*") (finding no evidence of the Framers' view toward searches of other vehicles).

> in the cabin, steerage or forecastle of such ship or vessel, or in any other place separate from the residue of the cargo, it shall be the duty of said officer to take a particular account of every such box, trunk, cask, or package, and the marks, if any there be, and a description thereof; and if he shall judge proper to put a seal or seals on every such box, trunk, chest, cask, or package; and such account and description shall be by him forwarded to the collector of the district to which such ship or vessel is bound.

1790 Act, § 31, 1 Stat. at 164. The inspectors were also authorized to seal the hold and prevent its opening—and the unlading of the goods—until the inspectors returned. *See id.*, 1 Stat. at 165. In effect, the inspectors "created an administrative record, so that when the ship was unloaded, officials could 'compare the account and entries.'" Morgan Cloud, *Searching Through History, Searching for History*, 63 U. Chi. L. Rev. 1707, 1740 (1996) (analyzing an analogous portion of the Collection Act of 1789, § 15, 1 Stat. at 40-41). Section 31 did not, however, authorize the opening of any items; nor did it authorize the inspectors to seize anything.

Those powers were delineated in other provisions of the Act. For instance, section 47 actually permitted "the collector or other officer of the customs . . . to open and examine" such "packages," but only "in the presence of two or more reputable merchants." 1790 Act, § 47, 1 Stat. at 169-70. A second provision allowed search *and* seizure.

> [E]very collector, naval officer and surveyor . . . shall have the full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed: and therein to search for, seize and secure any goods, wares or merchandise.

Id., § 48, 1 Stat. at 170. The Court has interpreted the "reason to suspect" language to require a showing of probable cause.

See Wyoming v. Houghton, 526 U.S. 295, 300 (1999); *accord Vernonia School District 47J v. Acton*, 515 U.S. 646, 670-71 (1995) (O'Connor, J., dissenting) (citing identical language in the Collection Act of July 31, 1789, § 24, 1 Stat. at 43). Thus, it appears that the first Congress required probable cause for the most intrusive search it authorized, a higher standard than the Court of Appeals applied here.

Finally, the provision of the 1790 Act relied upon by the Solicitor General does not authorize the use of force by inspectors. *See* 1790 Act, ch. 35, § 31, 1 Stat. at 164. The various Courts of Appeals found the use of force to be an important factor in determining whether a search is routine. *See, e.g.*, *Molina-Tarazon*, 279 F.3d at 713-14. While the 1790 Act permits boarding, *see* 1790 Act, ch. 35, § 31, 1 Stat. at 164, it nowhere permits the use of force inherent in drilling into a conveyance or disassembling it. *Cf. Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (statute that authorized warrantless entry into premises in which liquor was kept did not permit agents to break a lock to allow entry without securing a warrant allowing forcible entry).[23] Because the first Congress did not authorize the use of force, its passage of the 1790 Act provides no support to the Solicitor General's argument.[24]

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[23] *Colonnade* found it significant that Congress had authorized a fine in the event that agents were refused entry. *See* 397 U.S. at 74, 77. The 1790 Act also provided for a fine in the event of resistance against inspectors. *See* 1790 Act, ch. 35, § 51, 1 Stat. at 170.

[24] The Solicitor General also cites statutory authority for searches of luggage. B.U.S. at 23-24. Respondent does not challenge the constitutionality of searches of luggage.

3. The Colonists' Attitudes Toward Extensive Customs Searches At the Time of the Framing Suggest That the First Congress Would Not Have Considered Searches Involving Destruction or Disassembly of Conveyances To Be Reasonable.

In the pre-revolutionary period, customs searches of vessels were a source of significant controversy. "In the last years before the American Revolution, Americans increasingly regarded not only houses but ships as castles." *Cuddihy* at 1215; *see also id.* at 362-63 ("Although their arguments were more visceral than intellectual, many ordinary colonists regarded not only their cabins but also their ships and even their persons as sanctuaries against the government."). The colonists' assertion of a right to security in their property, in this case ships, prompted opposition to excessively intrusive searches of vessels. *See id.* at 1217-18 ("Opinion against promiscuous searches afloat was an offshoot of deepening opposition to the same kind of searches on land by general warrant and writ of assistance."); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 Amer. Crim. L. Rev. 603, 629 (1982) ("*Grano*") ("[c]olonists protest[ed] the search [of John Hancock's sloop, the Liberty]"); Oliver M. Dickerson, *The Navigation Acts and the American Revolution* 218-19 & n.22 (1951) ("*Navigation Acts*") (colonists objected to searches involving rough treatment and breaking items by customs officers); *see* Harris J. Yale, Note, *Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception*, 11 Hofstra L. Rev. 733, 748 n.122 (1983) (protests over the search and seizure of Hancock's vessel indicate that the Fourth Amendment's "prohibition of unreasonable searches [was] intended to cover . . . vessels at sea"). In addition, "the colonists . . . loathed the customs officials." *Grano* at 619; *accord Navigation Acts* at 219.

In view of the colonists' objections to excessive searches of ships, and their hostility to customs officers, it is highly unlikely that the first Congress would have regarded suspicionless searches and seizures of conveyances involving the use of force or disassembly as "reasonable" under the Fourth Amendment.[25]

4. The Solicitor General Has Offered No Evidence That Searches and Seizures That Involved the Use of Force or Disassembly of Property Were Permissible Under the Common Law.

The Solicitor General does not discuss "'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. . . .'" *Atwater*, 532 U.S. at 326. The Court in *Boyd* quoted extensively from Lord Camden's opinion in *Entick v. Carrington*, portions of which establish the relevant common law. "'By the laws of England, every invasion of private property, be it ever so minute, is a trespass.'" *Boyd*, 116 U.S. at 627 (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029); *see also* 8 William Holdsworth, *A History of English Law* 467 (1938) (Lord Camden's analysis applied to real and personal property). As a result, one committing a trespass "'is bound to show, by way of justification, some positive law has justified or excused him.'" *Id.* (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029). Thus, in order to show that searches and seizures effected by way of use of force or disassembly of conveyances were allowed under the common law, the

[25] The Framers understood that it was important to restrain the federal government in its efforts to acquire revenues. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 30 (1937) ("Lasson"). It would be inconsistent with that understanding for the first Congress to have intended for the Act of Aug. 4, 1790—a revenue statute—to have sanctioned broad incursions on the rights protected by the Fourth Amendment.

Solicitor General would be required to demonstrate that "some positive law . . . justified" such an extreme intrusion. *See id.* He has pointed to none.

In the years immediately preceding the American Revolution, the English government considered smuggling to be a major problem in the American colonies. *See* Jacob W. Landynski, *Search and Seizure and the Supreme Court* 30 (1966). The crown's "principal enforcement weapon [in the effort to stamp out smuggling] was the writ of assistance." *Id.* Although there is disagreement as to the source of the actual search power—whether it was from the writs of assistance or the Customs officers' commissions, *see id.* at 32 n.53[26]—neither authorized the broad intrusion now sought by the Solicitor General. For instance, a typical commission issued to a Customs officer allowed entry "into any Ship, Bottom, Boat or other Vessell . . . to make diligent search into any Trunk, Chest, Pack, Case, Truss or any other parcell or package whatsoever. . . ." *Cuddihy* at 509 n.6 (quoting a Customs commission from 1685). *See also* 4 Charles M. Andrews, *The Colonial Period of American History* 164 (1938) ("*Andrews*") (discussing a similar commission). Neither the language permitting entry into a vessel, nor the right to open receptacles that contain cargo explicitly authorizes disassembly of a conveyance in order to effect a search. *Cf. Colonnade*, 397 U.S. at 77; *see also* M. H. Smith, *The Writs of Assistance Case* 118 (1978) ("It needed little more than a riffle through familiar lawbooks . . . for any lawyer worth his fee to see that a power of forcible entry was

[26] *Compare Lasson* at 54, 69 (writs of assistance were necessary to search power) *with* Oliver M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *The Era of the American Revolution* 45 (Richard B. Morris ed., 1939) ("*Writs of Assistance as a Cause*") (the writs of assistance were the method by which the customs officers sought a "court order to the constables and other officers to assist the customs officers in the exercise of their duties").

by no means to be inferred from a power of entry, and without clear statutory authority it could not lawfully exist.").

Similarly, the use of force to effectuate the search powers granted in a customs officer's commission was highly controversial. *See Andrews* at 164 (citing instructions from England in 1683 that told collectors "to do no more than 'enter into any ship, bottom, boat, or other vessel, as also into any shop, house, warehouse, hostelry, or other place whatsoever, to make diligent search into any trunk, chest, pack, case, truss, or any other parcell or packadge whatsoever, for any goods, wares, merchandizes, prohibited to be exported or imported, or whereof the customes or other dutyes have not been duely paid and the same to seize to his Majesty's use'") (quoting a 1683 commission printed in *Maryland Archives* V, at 521). Even where force was allowed, it was only permitted in the case of resistance, and the application of force was authorized only as to items that, unlike a fuel system, were expected to be opened from time to time, such as doors, luggage and shipping materials. *See Writs of Assistance as a Cause* at 45 n.6 (customs commission from 1772 gave "power . . . in case of resistance to break open any Door, Trunk, Chest, Case, Pack, Truss or any other Parcel or package . . ."). There was no authorization for the use of force or disassembly beyond those parameters.

Because the Solicitor General has not met his burden to demonstrate a "positive" justification, *see Boyd*, 116 U.S. at 627, for the sort of intrusion he seeks to justify here, he has not demonstrated that a similar intrusion would be permitted under the common law.

D. If the Court Applies a Balancing Test, Respondent's Privacy and Property Interests Outweigh the Government's Interest in Randomly Disassembling Vehicles at the Border.

The Solicitor General argues that the Court should apply a balancing test to determine whether or not suspicionless searches and seizures of a vehicle's fuel system are reasonable under the Fourth Amendment. *See* B.U.S. at 11-19. Given that the Solicitor General cannot demonstrate that searches and seizures of conveyances that involve the use of force or disassembly were legitimate at the time of the adoption of the Fourth Amendment, it is questionable whether resort to a balancing test is necessary. *See Vernonia School District*, 515 U.S. at 652-53 (the Court proceeds to a balancing analysis "[a]t least in . . . case[s] . . . where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted"). Even if a balancing test should be undertaken, the Court has already effectively performed that analysis by holding in *Montoya de Hernandez*, *Almeida-Sanchez*, and *Ramsey* that the border search exception applies only to routine searches and seizures. The Courts of Appeals have properly applied that analysis to searches and seizures of personal property. If the Court performs that balancing anew, the scales clearly tip toward vindication of travelers' Fourth Amendment interests.

In performing such a balancing test, "'the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Villamonte-Marquez*, 462 U.S. at 588 (quoting *Prouse*, 440 U.S. at 654). The intrusion on individual interests is sub-

stantial, while the Solicitor General has failed to demonstrate any significant need for the unfettered discretion he seeks.[27]

First, "[a] search, even of an automobile, is a substantial invasion of privacy." *Ortiz*, 422 U.S. at 896. Although the Solicitor General asserts that the privacy interest at stake in the instant search is "minimal," B.U.S. at 25-26, the Court, referring to the facts in *Carroll*, has recognized that "[a]n individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened." *Ross*, 456 U.S. at 823. The Court's observation in *Ross* is no less applicable here.

Moreover, the individual's Fourth Amendment interests in this case are not limited to his or her privacy concerns. The removal of a gas tank is not only a search, but also a seizure of property. "A 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Soldal*, 506 U.S. at 61 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The "[Fourth] Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal.'" *Robbins v. California*, 453 U.S. 420, 426 (1981), *overruled on other grounds*, *Ross*, 456 U.S. 798. Although the Solicitor General, apparently disagreeing with *Ross*, denigrates the privacy interests implicated by the disassembly of Respondent's fuel system, B.U.S. at 25, "the [Fourth] Amendment protects property as well as privacy."

[27] In fiscal year 2003, 348 empty gas tanks were disassembled. B.U.S. at 31. Requiring reasonable suspicion will allow many legitimate travelers to avoid unwarranted intrusions. *See Vernonia School District*, 515 U.S. at 667 (O'Connor, J., dissenting) ("Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.").

Soldal, 506 U.S. at 62; *see also Boyd*, 116 U.S. at 630 (the Fourth Amendment protects the "indefeasible right of personal security, personal liberty, and private property"). In fact, "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." *Id.* at 68.

These property rights, like privacy interests, play a role in the Court's balancing test. Thus, in *Jacobsen*, the Court stated that "[t]o assess the reasonableness of this conduct, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" 466 U.S. at 125 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)); *accord Soldal*, 506 U.S. at 71. Respondent's property interests weigh heavily in his favor: his right to be "secure" from "unreasonable searches and seizures" of his "effects," U.S. Const. amend. IV, should provide protection against disassembly of valuable property in which he reposes his trust by unknown government functionaries whom he has neither selected nor approved. Indeed, those interests provide additional support to *Molina-Tarazon*'s emphasis on the security interests implicated by the danger and the fear resulting from intrusions like those undertaken as to Respondent's vehicle. *See* 279 F.3d at 714-17.

While Respondent's Fourth Amendment interests are substantial, the Solicitor General offers little evidence to support his claim that vindication of the government's interest in border security requires that low-level border inspectors be vested with absolute discretion to disassemble vehicles even in the absence of any basis for their suspicions. As an initial matter, the Solicitor General does not dispute Respondent's argument "that the government has not demonstrated that customs or immigration inspectors regularly conduct suspicionless gas tank searches." B.U.S. at 19. The failure to offer such evidence below belies the Solicitor General's claim that

such searches "are an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband." *See id.* at 16.

In the absence of any evidence of a policy under which border inspectors employ their "essential tool" at the border, the Solicitor General argues that "[a] requirement of reasonable suspicion would remove the significant deterrent effect of suspicionless searches and could actually encourage criminals to use gas tanks as a means of smuggling contraband." B.U.S. at 17; *see also id.* at 19 (emphasizing deterrence). Indeed, both Director Ahern and Assistant Director Hinckley speculate that the Ninth Circuit's decision in *Molina-Tarazon* will lead to an increase in the use of gas tanks in smuggling efforts and a decrease in the effectiveness of the efforts of Customs and Immigration inspectors to combat these activities. Pet. App. at 13a, 16a-17a.[28]

The Solicitor General's assertions are not supported by any evidence, statistical or otherwise. This shortcoming is significant because of the decisions in *Rivas* and *Carreon*. In *Rivas*, a border inspector drilled into Rivas' camper, an item of personal property. The Fifth Circuit held that the search was nonroutine and that the Fourth Amendment required a showing of reasonable suspicion. *See* 157 F.3d at 367; *accord Robles*, 45 F.3d at 5. Thus, for over 5 years it has been the law of the Fifth Circuit—which contains some of the nation's busiest ports of entry—that reasonable suspicion must be established to support certain searches of personal property. Yet the government offered no evidence regarding

[28] *Amici* sound an alarmist note, insisting—without explanation—that vindicating Respondent's Fourth Amendment interests will somehow deprive the government of the authority to undertake suspicionless searches of cargo. *Amici* at 17. Respondent's analysis of the interests implicated in the disassembly of his vehicle's fuel system bear no relationship to the issues raised by cargo searches.

the effect of *Rivas* on the operations of Customs and Immigration inspectors in the Fifth Circuit.

The Tenth Circuit, which also contains a border state, interpreted *Montoya de Hernandez* to "require[]" a "particularized and objective basis" for a finding of "reasonable suspicion" to justify a nonroutine search in which an inspector drilled into a camper wall. *Carreon*, 872 F.2d at 1443. *Carreon* was decided 15 years ago. Yet the government offered no evidence regarding the effect of the *Carreon* decision on the operations of Customs and Immigration inspectors in the Tenth Circuit.

The Solicitor General's attempt to go outside the record[29] and assert that "Customs authorities have advised that officers . . . [working] within the First, Fifth, and Tenth Circuits . . . [conduct] searches [involving fuel system disassembly] on the assumption that no level of suspicion is required," Pet. Reply at 6, does not undercut this analysis. At most, the Solicitor General's extra-record information is an attempt to mitigate the government's failure to offer evidence of an increase in gas tank smuggling in the First, Fifth and Tenth Circuits based on the application of a reasonable suspicion requirement.[30] What he overlooks, however, is his basic premise: he argues that smugglers are so sensitive to reasonable suspicion requirements that they change their behaviors to take advantage of them. B.U.S. at 17-18. If that is so, and if his extra-record information is correct, then in the First, Fifth and Tenth Circuits, we should expect that nonfactory compartment smuggling, i.e., smuggling in compartments created by the smugglers, would increase because reasonable suspicion would be required to drill into or

[29] *See Witters*, 474 U.S. at 488 n.3 ("this Court must affirm or reverse upon the case as it appears in the record").

[30] In addition, Customs' "assumption" is contrary to the reasoning of *Rivas, Robles* and *Carreon*.

forcibly disassemble them, while gas tank smuggling, as to which "Customs advised [searches are done] on the assumption that no level of suspicion is required," *Reply* at 6, would decrease. But the government offered no such evidence below. Thus, regardless of whether Customs' communications with the Solicitor General are properly before the Court and are accurate, the government still failed to offer evidence rather than speculation in the district court.

In short, if smugglers were actually hyper-sensitive to Fourth Amendment decisions, and if the government's ability to protect the border actually was significantly impaired by the recognition that the nonroutine search doctrine also applied to searches of personal property, then the government would have offered such evidence below. Its failure to do so suggests that the speculation offered in the declarations of Director Ahern and Assistant Director Hinckley is just that—speculation. No evidence supports the Solicitor General's argument that the government has a substantial interest in conducting suspicionless disassemblies of fuel systems. *See Prouse*, 440 U.S. at 659-60 (questioning state government's claim that suspicionless stops of vehicles to check registration and license would provide greater deterrence than stops based on suspicion of traffic violations).

Similarly, there is no evidence before the Court that the disassembly and removal of a gas tank is the only practicable means of determining whether the tank contains contraband. The Solicitor General goes no further than to say that the "process [of removing the gas tank] *may* be the only practicable alternative for the government to determine whether the gas tank has been modified or altered." B.U.S. at 16 (citing *Molina-Tarazon*, 279 F.3d at 712 & nn. 2-3) (emphasis added). The declarations simply do not speak to

which alternatives are practicable.[31] Indeed, they do not establish that a gas tank disassembly is *ever* the only practicable alternative.[32]

Not only do the declarations fail to support the Solicitor General's position, a comparison to the checkpoints analyzed in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), demonstrates that he has failed to justify his claim that it is essential that border inspectors not be required to demonstrate any basis for disassembling vehicles. In *Martinez-Fuerte*, the Court noted that

> [a] requirement that stops on major [highway] routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.

Id. at 557. Because a reasonable suspicion requirement would preclude "particularized study," imposition of "such a requirement would largely eliminate any deterrent to well-disguised smuggling operations." *Id.*

Vindication of travelers' Fourth Amendment rights by requiring reasonable suspicion would have absolutely no effect on border inspectors' ability to undertake the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens or contraband.

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[31] Customs, however, maintains that its non-intrusive search methods are very effective and allow it to avoid dismantling property. *See generally Customs' Annual Report* at 32, 34.

[32] The Solicitor General warns that liability concerns may deter border inspectors if the Court holds that the instant intrusion must be supported by reasonable suspicion. B.U.S. at 17. Again, the government offered no evidence of such deterrence in the Circuits that have already required reasonable suspicion in the proceedings below. Nor can he argue that the reasonable suspicion standard is unfamiliar or difficult to apply. *See Atwater*, 532 U.S. at 366 (O'Connor, J., dissenting).

Sustaining Respondent's claim would leave border inspectors free to question border crossers,[33] observe their behavior,[34] tap on gas tanks and suspected compartments,[35] and make observations of the vehicle,[36] including those aided by devices such as an "auto-creeper."[37] They will be free to employ narcotics detector dogs,[38] "density busters,"[39] fiber optic scopes,[40] x-ray machines[41] and the like. All of these

[33] *See, e.g., United States v. Bravo*, 295 F.3d 1002, 1004, 1008 (9th Cir. 2002) (inspector suspicious because defendant was "'overly-friendly'").

[34] *See, e.g., Carreon*, 872 F.2d at 1437, 1442 (inspector had reasonable suspicion to conduct a nonroutine border search where the defendant was nervous and looked away when he was spoken to, and his hand shook).

[35] *See, e.g., Bravo*, 295 F.3d at 1004, 1008 (finding inspector had reasonable suspicion as to a tool box because it sounded solid and had a space discrepancy in the bottom of it).

[36] *See, e.g., Molina-Tarazon*, 279 F.3d at 717-18 (finding reasonable suspicion based on unusual mud pattern and the presence of "freshly replaced gas hoses"); *Carreon*, 872 F.2d at 1437 (inspector observed shiny bolts on camper in which compartment found, and the shell was very thick and sounded solid).

[37] *See Molina-Tarazon*, 279 F.3d at 712 n.1 ("An autocreeper is a mirror attached to the end of a long pole with which one can view the undercarriage of a vehicle.").

[38] *See, e.g., Rivas*, 157 F.3d at 368 ("a drug-dog's alert is sufficient to create probable cause for a search").

[39] "[A] 'Buster' [is] a device that measures [the] density [of an object]." U.S. Customs Service Press Release, *U.S. Customs Operation Hard Line Officers Make First Significant Narcotics Interdiction at New Calexico Cargo Facility* (Jan. 27, 1997), http//www.cbp.gov/hot-new/pressrel/1997/0127-00.htm (last visited Dec. 2, 2003). The cited press release reflects that "[c]argo enforcement team members checked the truck with a 'Buster,' . . . and got abnormal readings from the saddle tanks of the tractor. Careful examination of the gas tanks revealed specially-built compartments inside of them, and the compartments were found to contain 219 packages of marijuana." *Id.*

[40] *See Molina-Tarazon*, 279 F.3d at 712 n.2 ("a fiberoptic scope is similar to a telescope with six feet of light-carrying cable that the operator can feed into the fill neck"); *see also* U.S. Customs Service Press Release, *U.S. Customs Inspectors Seize 4.7 Million In Cocaine In Gas Tank, One Arrested* (March 26, 1999), http//www.cbp.gov/hot-new/pressrel/1999/0326-01.htm (last visited Dec. 29, 2003) (105 pounds of cocaine found through use of "a super fiber optic scope" in vehicle's gas tank).

methods may be employed randomly to provide the deterrence the Solicitor General desires; none of them would in any way be circumscribed by affirming the Court of Appeals.[42] Because these various methods are available to permit inspectors to develop cause to justify disassembly of a fuel system in the appropriate case, the concerns that animated *Martinez-Fuerte*'s decision to dispense with individualized suspicion are absent. *See Martinez-Fuerte*, 428 U.S. at 557; *cf. Vernonia School District*, 515 U.S. at 679 (O'Connor, J., dissenting) (individualized suspicion "may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual").

The array of methods available to border inspectors demonstrates that the governmental interest in conducting suspicionless intrusions is far less compelling than that in *Montoya de Hernandez*. There, the Court noted that the alimentary canal smuggling at issue in that case "appears to be exceedingly difficult to detect." *Montoya de Hernandez*, 473 U.S. at 538-39. Recognition of a reasonable suspicion standard as a precondition of the detention in that case was burdensome for the government because "this type of

[41] *See United States v. Vargas-Castillo*, 329 F.3d 715, 717, 722-23 (9th Cir. 2003) (customs official drove suspected vehicle into an "X-ray station" at the port of entry).

[42] For reasons that they do not divulge, *Amici* think that sustaining Respondent's claim may limit the use of X-rays on vehicles at the border. *Amici* at 17. They are wrong. *See United States v. Okafor*, 285 F.3d 842, 846 (9th Cir. 2002) ("We hold that examination of luggage and other containers by x-ray or other technological means may be done at the border with no required showing of particularized suspicion. . . .").

smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search. . . ." *Id.* at 541. If "inspectors will rarely possess probable cause," it is also true that the development of reasonable suspicion will be difficult.

Here, the barriers to developing reasonable suspicion are far less substantial than those encountered by officials seeking to detect alimentary canal smuggling. *See Brignoni-Ponce*, 422 U.S. at 883 ("the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators"); *accord Prouse*, 440 U.S. at 656. The government's interest in the authority to conduct suspicionless intrusions is correspondingly lower than the interest it asserted in *Montoya de Hernandez*. In fact, in those very few cases where the government has failed to meet the reasonable suspicion standard, it either litigated the issue incompetently, *see Rivas*, 157 F.3d at 368 (the government failed to call the dog handler or any expert to explain the dog's ambiguous reaction to the vehicle), or simply chose not to try. *See* Pet. App. at 3a (the district court found that "the Government has waived its right to rely on . . . reasonable suspicion [because] the Government has declined to establish [it]"). A reasonable suspicion requirement will place reasonable limits on the discretion of low-level officials to effect nonroutine searches and seizures at very little cost.

Finally, the Solicitor General cites the apprehension of a would-be terrorist who planned to detonate explosives at LAX airport as a basis for taking a narrow view of the Fourth Amendment rights of citizens entering this country. B.U.S. at 18 (citing *United States v. Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002)). *Ressam*, of course, has no application to the instant controversy: it involved a search of a trunk. *See Ressam*, 221 F. Supp. 2d at 1254. While it is true that terrorist activity represents a grave threat to the Nation, no evidence offered below supports the view that the Ninth

Circuit's decisions in *Molina-Tarazon* and the instant case, or the decisions in *Rivas*, *Robles* and *Carreon*, in any way circumscribe the Nation's ability to defend itself. Indeed, the declarations filed below do not even make this claim.

In short, the Solicitor General has not demonstrated that vindication of travelers' Fourth Amendment rights will make the Nation vulnerable. Rather, the impressive array of techniques and equipment available to border inspectors suggests quite the opposite. Even though risk can never be eliminated, the Court has recognized that "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez*, 413 U.S. at 273. The interests advanced by the Solicitor General do not justify the intrusion into Respondent's Fourth Amendment rights.

E. Every Circuit Court that has Considered the Issue has Held that a Nonroutine Border Search Must be Supported by Reasonable Suspicion; the Suggestion That Only Some Nonroutine Searches Need Be Supported By Reasonable Suspicion Should Be Rejected.

The Solicitor General and *Amici* suggest that some nonroutine searches constitute only "minimal intrusions" and need not be supported by reasonable suspicion. *See* B.U.S. at 10; *Amici* at 9-13. Although the Solicitor General devotes only a single paragraph to this notion, *Amici* explain that they advocate for an ad hoc test in which no one will know whether reasonable suspicion in support of a particular intrusion is required until a court rules on it. *See Amici* at 13. Because exceptions to the protections of the Fourth Amendment are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), and the border

search exception applies to routine searches, *Montoya de Hernandez*, 473 U.S. at 538, there is no basis for dispensing with the requirement of individualized suspicion when a search is nonroutine.

Morever, the Court's recognition that the reasonable suspicion standard "effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause," *id.* at 541, suggests that the reasonable suspicion standard is proper under these circumstances. As discussed above, a reasonable suspicion requirement will also appropriately balance private and governmental interests by protecting privacy and property rights while placing only a minimal burden on the government in light of its substantial ability to develop facts supporting reasonable suspicion. *See supra* at 33-43.

Amici cite no case adopting their view. In fact, every Circuit court that has considered this issue has followed *Montoya de Hernandez* and held that if the search is nonroutine, then the applicable standard is reasonable suspicion. *Molina-Tarazon*, 279 F.3d at 717; *Rivas*, 157 F.3d at 367; *Robles*, 45 F.3d at 5; *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994); *United States v. Johnson*, 991 F.2d 1287, 1291 (7th Cir. 1993); *Carreon*, 872 F.2d at 1440-42; *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986)[43]; *see also United States v. Boumelhem*, 339 F.3d 414, 420 n.3 (6th Cir. 2003). Reaffirming that nonroutine searches must

[43] *Amici* claim that the *Oyekan* does not support Respondent's position. *See Amici* at 12-13. The Eighth Circuit applied the reasonable suspicion standard to certain searches of travelers without addressing intrusions on property. *See Oyekan*, 786 F.2d at 837 ("join[ing] those circuits holding that a reasonable suspicion that a person is carrying drugs on the outside of his body may insulate a strip search from fourth amendment challenge").

be supported by reasonable suspicion will impose no significant burden on the government and will maintain a workable rule.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Ninth Circuit in this case applied its rule that a gas tank, one of the most common means for smuggling contraband, is the one container in a car that border officials may not open without reasonable suspicion. None of the arguments advanced by respondent justifies that significant restraint on the government's ability to protect the border.

A. The Government Has A Paramount Interest In Being Able To Search Gas Tanks Without A Requirement Of Reasonable Suspicion

1. Respondent argues that customs officials are likely to be interested in searching a gas tank only when they suspect that the tank is concealing contraband, and that the Ninth Circuit's decision leaves officials free to conduct the search when they have a reasonable suspicion. Br. 4-5, 9, 39, 41-44. Respondent underestimates the governmental interest in the ability

of customs officials to conduct thorough searches of gas tanks without reasonable suspicion. The power to search at the border without any particularized suspicion is instrumental in vindicating the sovereign's intrinsic and essential interest in preventing smuggling into this country and in protecting the Nation's border and its citizens. To that end, customs officials may search an international traveler's outer clothing, pockets, shoes, purses, wallets, and baggage, as well as vehicular trunks, passenger compartments, and any closed containers stored in the trunk or passenger compartments. U.S. Br. 13-14. Those "searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant" because they serve the government's overriding interest in securing the border. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

That interest applies with full force to gas tanks. Gas tanks are already the primary vehicular container used by smugglers along the Southern border to smuggle narcotics, and gas tanks may be used to conceal the smuggling of other items, including instruments of terrorism. U.S. Br. 15-16. Requiring reasonable suspicion to search gas tanks would not only remove a powerful deterrent to smuggling, but because such a requirement does not exist with respect to other vehicular containers and compartments, it would make gas tanks the means of choice for smuggling dangerous or unwanted items and persons into the country. *Id.* at 17-18.[1]

[1] Respondent argues that a search of the gas tank is not necessary to detect alien smuggling because "people cannot be concealed in an operating tank." Br. 5. The point, however, is not that aliens are generally found inside operating tanks holding fuel, but rather, that customs officials need wide authority to search in order to ensure that the gas tank has not been modified to conceal alien smuggling. U.S. Br. 17-18; Pet. App. 15a-17a; see, *e.g. United States* v. *Fimbres*, 49 Fed. Appx. 726, 727 (9th Cir. 2002) (discovery of an "alien concealed in [a van's] modified gas tank compartment"), cert. denied 123 S. Ct. 1645 (2003); *United States* v. *Valenzuela-Gonzalez*, No. 00-50215, 2000 WL 1875819, at *1 (9th Cir. Dec. 26, 2000) (alien found in gas tank compartment).

Those important interests exist whether the search is actually conducted, because the possibility of a search without a reasonable suspicion serves to deter would-be smugglers in the first instance from using the gas tank as means of concealing contraband. Accordingly, the fact "[t]hat the customs authorities do not search every person crossing the border does not mean they have waived their right to do so, when they see fit." *Witt* v. *United States*, 287 F.2d 389, 391 (9th Cir. 1961); see also U.S. Br. 19.

A reasonable suspicion requirement would inevitably lead to fewer gas tank searches and a concomitant increase in gas tank smuggling. Similarly, because the question whether an official had reasonable suspicion to search in any given case is often contested and, at times, decided adversely to the government, a reasonable suspicion requirement may inhibit officers from conducting searches out a fear of personal liability. U.S. Br. 17.

2. Respondent argues that the government may further its interest at the border by using alternative methods to search a gas tank that do not involve the removal and manual search of the tank. Br. 4, 38-42; NACDL Am. Br. 21-26. The Fourth Amendment, however, does not require the government to exhaust every technologically feasible and alternative means of conducting a search when the actual procedure used in a

particular case is reasonable. "[F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of [law enforcement] officers." *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 453-454 (1990). This Court accordingly has repeatedly declined to consider whether the government could employ a less intrusive means to accomplish its legitimate law enforcement objectives. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 350 (2001) ("a least-restrictive-alternative limitation * * * is * * * one of those * * * rules[] generally thought inappropriate in working out Fourth Amendment protection" (citation omitted)); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (refusing to consider "a list of less drastic and equally effective means of addressing the Government's concerns") (internal quotation marks omitted)); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.").

Such an inquiry would be particularly inappropriate in a context in which the government's interest is at its apex and the creativity of smugglers requires constant vigilance on the part of border officials. Customs officials should be given wide latitude to chose which method of searching a gas tank best serves the interests of border security.

Requiring the government to use alternative means to ascertain the contents of a gas tank would also undermine the government's ability to prevent smuggling through gas tanks. The most effective and reliable way

to ascertain what is inside a gas tank, like any other container, is actually to open it. The alternative search techniques posited by respondent are not available to customs officials at all times and at all border ports of entry, and each technique has its limitations. For example, narcotics dogs may fail to alert to narcotics hidden within a gas tank. U.S. Br. 16. Such dogs, whether trained to detect narcotics or explosives, will not alert to other forms of hidden contraband (*e.g.*, nerve agents, toxins). Similarly, the use of fiber-optic scopes will not be effective in the many tanks that contain manufacturer-installed devices that block the insertion of scopes into the tank. *Ibid.*

While advanced equipment such as mobile x-rays and density busters are often very effective in revealing the presence of contraband, "[a]ny single sensor or device may be defeated by a determined adversary." U.S. Customs Service, *Performance and Annual Report Fiscal Year 2002*, at 18; see *id.* at 35 ("[D]rug smuggling organizations are very creative in developing new strategies to try to circumvent Customs efforts."); *United States* v. *Robles*, 45 F.3d 1, 2-3 (1st Cir.) (x-ray of wooden crate holding metal cylinder concealing cocaine "proved inconclusive"), cert. denied, 514 U.S. 1043 (1995). For instance, a density buster detects solids situated only very closely to the outside of an object. SAS R&D Servs., *The Buster K910B* (2000) <http://www.sasrad.com/catalogues/buster.pdf> (describing depth of reading as variable to 6 inches). Accordingly, such equipment would not detect liquid contraband (such as hydriatic acid, a precursor to methamphetamine) and may not detect solid contraband floating or suspended in the tank away from its exterior walls.

Scanning devices that use x-rays or gamma rays also have limited use for many gas tanks. The devices are not designed to image passenger vehicles or their internal compartments, but rather, are designed to image large hollow containers carried typically on tractor-trailers. *E.g.*, SAIC, *VACIS: SAIC's Vehicle and Cargo Inspection System* 6 (2002) <http://www.saic.com/products/security/pdf/VACISbrochure.pdf>. Such equipment is also very expensive, typically costing between $1 and $2 million per device and several hundred thousands of dollars in annual maintenance costs. DMIA Task Force, Dep't of Homeland Security, *Data Management Improvement Act Task Force Second Annual Report to Congress* (Dec. 2003) <http://www.uscis.gov/graphics/shared/lawenfor/bmgmt/inspecRprt2Chapter5.pdf>; Gail Repsher Emery, *SAIC Wins $15 Million Cargo Inspection Contract*, Washington Tehnology, May 22, 2001 <http://www.washingtontechnology.com/news/1_1/daily_news/16590-1.html>. Those devices are accordingly of limited availability and are allocated to high priority uses and locations.

B. The Nation's History Supports The Power Of Customs Officials To Conduct Border Searches Through The Use Of Force Or Disassembly

Respondent erroneously argues that customs officials historically had no power to use force or disassembly in order to conduct a suspicionless border search. Br. 25-32; accord NACDL Am. Br. 8-11.

The same Congress that passed the Fourth Amendment explicitly permitted customs officials to board ships and vessels "for the purposes * * * of examining and searching" the ships and vessels and to "examine the cargo or contents" of those conveyances as they

entered this country. Act of Aug. 4, 1790, ch. 35, §§ 30, 31, 1 Stat. 164; see § 29, 1 Stat. 164 (permitting customs officials to "examine[]" unloaded parcels and packages containing dutiable items). This Court has recognized that the Nation's earliest laws authorized "the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid," and "[t]he search for and seizure of * * * goods liable to duties and concealed to avoid the payment thereof." *Boyd* v. *United States*, 116 U.S. 616, 623 (1886); accord *Maul* v. *United States*, 274 U.S. 501, 505 (1927) (explaining that customs officials had power to "board and search vessels bound to the United States and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in"); U.S. Br. 21. Those laws imposed no requirement of suspicion in order to search. Indeed, Congress in 1799 confirmed that customs officials had the power, "whenever" they "shall think proper," to search the baggage of international travelers. Act of Mar. 2, 1799, ch. 22, § 46, 1 Stat. 662.[2]

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[2] Respondent errs in relying (Br. 27) on Section 47 of the 1790 Act, which provided that "on suspicion of fraud" customs officials must open packages in the presence of "two or more reputable merchants." Act of Aug. 4, 1790, ch. 35, § 47, 1 Stat. 169-170. That authority was not limited to the border and did not purport to limit the authority explicitly conferred by other provisions of the Act that applied at the border. The same is true with respect to Section 48 of the Act, 1 Stat. 170, also relied upon by respondent (Br. 27-28). See *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 586 n.4 (1983) (explaining that "nothing in [Section 48] can be read to limit" the authority to board vessels conferred by Section 31); U.S. Br. 22 n.2. Respondent similarly is incorrect in contending (Br. 28) that *Wyoming* v. *Houghton*, 526 U.S. 295, 301 (1999), and Justice O'Connor's dissenting opinion in *Vernonia*

The framers of the Fourth Amendment could not have intended for customs officials to conduct thorough searches of ships, cargo, and baggage to look for dutiable items without the power to use force or disassembly. "[C]ertainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed." *Wyoming* v. *Houghton*, 526 U.S. 295, 301 (1999) (quoting *United States* v. *Ross*, 456 U.S. 798, 820 n.26 (1982)). Similarly, in authorizing officials to examine and search ships entering the country, Congress intended customs officials to search hidden places (such as floor planks or false compartments on ships) where dutiable items or contraband could be shielded from revenue officers. C.E. Prince & M. Keller, Dep't of the Treasury, *The U.S. Customs Service: A Bicentennial History* 225, 230 (1989) (discussing customs officials' discovery in early 1900s of opium smuggled at the border "in tins of dry paint or tobacco, under floors, in furniture—even stashed in the boots or on the persons of passengers and crew," and "in 400 tins hidden in the hollow wall of another vessel").

The power to search for hidden contraband would be rendered meaningless without the authority to use

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School District 47J v. *Acton*, 515 U.S. 646, 671 (1995), concluded that the 1790 Act imposed a requirement of probable cause. Neither opinion stated that probable cause was required at the border. Instead, those cases relied ultimately on the analysis in *Carroll* v. *United States*, 267 U.S. 132, 150-151 (1925), which concerned primarily the Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43, and not the provisions discussed above and in *Villamonte-Marquez*, 462 U.S. at 584-585. Moreover, *Carroll*, 267 U.S. at 154, explicitly recognized that vehicles may be stopped and searched at the border without suspicion.

force or disassembly to inspect a vehicle for hidden contraband. Contraband smuggled within a vehicle is almost always "enclosed within some form of container." *Ross*, 456 U.S. at 820. "During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Wyoming* v. *Houghton*, 526 U.S. at 301 (quoting *Ross*, 456 U.S. at 820 n.26). Customs officials thus regularly use some force or disassembly when conducting searches of closed compartments and containers at the border; that use of force falls within the traditional authority of customs officials to conduct border searches without reasonable suspicion. U.S. Br. 29-30.

C. A Gas Tank Search Imposes A Minimal Intrusion On Individual Interests

1. Respondent argues that a search of a vehicle "is a substantial invasion of privacy" and that a gas tank search "is neither expected nor welcome." Br. 18, 34 (quotation marks omitted). "The Fourth Amendment does not treat a motorist's car as his castle," *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004), however, because a vehicle "seldom serves as one's residence or as the repository of personal effects," *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974). That is particularly true with respect to the vehicle's gas tank, which is intended solely to serve as a repository for fuel. Indeed, respondent concedes that customs officials can, without any level of suspicion, search the inside of a gas tank through x-rays, density-busters, and the forcible placement of a scope inside the tank. See Resp. Br. 40-41.

The act of disassembly and opening the tank likewise does not invade the motorist's privacy interests.

The motorist's expectation of privacy is also "less at the border." *Montoya de Hernandez*, 473 U.S. at 539. Thus, whatever "inconvenience and indignity" may be caused by a stop of a vehicle traveling in the interior, "[t]ravellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U.S. 132, 154 (1925). Thus, motorists crossing the border should reasonably expect that customs officials, if they see fit, may search compartments and containers within the vehicle, including the gas tank, in order to deter and prevent smuggling at the border.[3]

Respondent attempts to equate a gas tank search that involves force and disassembly with the destructive drilling of holes into vehicular compartments, an action that some lower courts have treated as requiring reasonable suspicion. Br. 4, 9-10, 12-13, 36-37. Respondent also argues that some other searches of property likewise should require reasonable suspicion, such as a search that involves smashing a vase, Br. 14, or the dismantling of an entire vehicle, Br. 7, 15. None of those arguments, however, supports the imposition of a reasonable suspicion requirement for a gas tank search.

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[3] Respondent erroneously relies on the fact that a gas tank search involves a seizure. Br. 34-35. The incidental seizure of the car, however, is "reasonable" within the meaning of the Fourth Amendment for the same reason that the "search" is reasonable. Officers necessarily must effect a temporary seizure in order to carry out the search.

As an initial matter, certain searches involving damaging force, such as the exploratory drilling of a small hole into a frame of an auto-transport trailer, *e.g.*, *United States* v. *Rivas*, 157 F.3d 364, 366 (5th Cir. 1998), may cause such minimal damage to the motorist's property that a reasonable suspicion requirement would be unwarranted. Cf. *United States* v. *Molina-Tarazon*, 279 F.3d 709, 714 (9th Cir. 2002) ("For example, if the lock is jammed on a suitcase or its owner refuses to present a key, [customs] agents have to employ some degree of force to gain access to its interior."). And even assuming that some searches involving drilling must be preceded by reasonable suspicion, that type of search involves the intentional use of *destructive* force in order to complete the search. A gas tank search, by contrast, involves *disassembly* and *reassembly*, not the deliberately destructive use of force. See *Id.* at 719 (Brunetti, J. concurring) ("There is a very real distinction between the removal or disassembly of part of an automobile in the ordinary course of inspection, and the application of destructive force in order to facilitate inspection. * * * This inspection was conducted in a matter of 10-15 minutes with no permanent alteration or resulting harm to Molina-Tarazon's vehicle.").

Nor is a gas tank search comparable to the extreme hypothetical scenario where officials might "order a car disassembled down to the last o-ring, and hand it back to the owner in a large box." Resp. Br. 15 (quoting *Molina-Tarazon*, 279 F.3d at 713). Even assuming that some level of suspicion would be necessary before subjecting the motorist to the significant delay, inconvenience, and the resulting potential for impairing the value of the vehicle, a gas tank search involves a brief

procedure that can be reversed without damaging the safety or operation of the vehicle. U.S. Br. 25-27.

For similar reasons, a gas tank search does not remotely resemble the complete destruction of property in respondent's hypothetical of "smash[ing] a vase to view its contents." Resp. Br. 14. That example also involves the *gratuitous* damage to property, because customs officials presumably may ascertain the contents of the vase without destroying it simply by looking inside. This Court has left open "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." *United States* v. *Ramsey*, 431 U.S. 606, 618 n.13 (1977); see also 19 U.S.C. 1581(a) (customs officers may use "all *necessary* force to compel compliance" with authority to search) (emphasis added). Respondent has never argued, however, that the search in this case was unreasonable because of a particular manner in which the disassembly was executed or that unnecessary force was used to open the gas tank. Rather, respondent has relied on *Molina-Tarazon*'s per se imposition of reasonable suspicion requirement for gas tank searches that involve removal of the tank from the vehicle. Statement of Facts and Mem. of Points and Authorities in Support of Def. Motion 2 (June 4, 2002) ("Because the inspectors in this case removed the gas tank while searching the car, their actions amounted to a non-routine border search.").[4]

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[4] Respondent similarly has not challenged the search because the customs official testified that he hammered off bondo from the tank and in so doing "slightly scratched" and "possibly slightly dented" the tank. Pet. App. 8a.

2. Respondent contends that a gas tank search should require reasonable suspicion because it is "labor intensive," "potentially lengthy," and requires "specialized labor, skills and tools." Br. 17. None of those factors renders a border search of property so highly intrusive as to trigger a requirement of reasonable suspicion. Those factors may be equally present with the search techniques that respondent concedes may be employed at the border without reasonable suspicion (such as x-rays, fiber-optic scopes, and density busters). *Id.* at 40-41. Customs officials with highly specialized training and knowledge regularly inspect items, cargo, and conveyances at the border with some incidental delay, and border officials must regularly use force or tools to complete a thorough search of a vehicle. U.S. Br. 27, 29-30.

Moreover, a delay associated with a gas tank search is not unreasonable under the circumstances. Here, a mechanic arrived within 20 to 30 minutes; the entire process of elevating respondent's vehicle and disconnecting the tank was completed within 10 to 15 minutes; and the search of the tank and discovery of the drugs took only an additional 5 to 10 minutes. U.S. Br. 3, 27. Such delays at the international border are common and to be expected.[5]

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[5] See *Crossing the Border* (visited Jan. 30, 2004) <http://www.bytheborder.com/cgi-bin/english/traffic/index.cgi average wait times at San Ysidro and Otay Mesa ports for entry is 0-30 minutes for 0-60 vehicles per lane; 30-60 minutes for 60-120 vehicles per lane; 60-90 minutes for 120-180 vehicles per lane; and 90-120 minutes for 180-240 vehicles per lane); U.S. Customs & Border Protection, Dep't of Homeland Security, *Northern Border Ports of Entry* (visited Jan. 29, 2004) <http://forms.customs.gov/nemo/bordertimes/bordertimes.asp> (at 6:00 a.m., delay of 50 minutes at San Ysidro and delay of 25 minutes at Otay Mesa).

3. Respondent argues that "a gas tank disassembly raises issues of danger" because there is the possibility of error "in removing, disassembling and then reassembling" the gas tank and it is "common sense" that a "fuel leak [could] cause[] a fire or explosion." Br. 21-22 (quoting *Molina-Tarazon*, 279 F.3d at 715). Respondent's amicus similarly asserts that the mechanic or the vehicle may be injured if the search is not performed by trained professionals using safe procedures and equipment. NACDL Br. 14-21.

Concerns about the possibility of mechanic error do not justify the court of appeals' decision. Respondent cites not a single accident involving the vehicle or motorist in the many thousands of gas tank disassemblies that have occurred at the border. Moreover, customs officials conduct such searches in a reasonable manner with due regard to safety by having qualified professionals perform the search. U.S. Br. 15, 31.[6]

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[6] None of the decisions cited by amicus NACDL (Br. 13 n.11) involves the danger and fear cited by the Ninth Circuit in *Molina-Tarazon*, 279 F.3d at 716-717: a negligently reassembled fuel tank malfunctioning on the road. Four decisions did not even involve malfunctioning vehicular gas tanks. *Stephens* v. *State*, 447 S.E.2d 26, 28 (Ga. Ct. App. 1994) (arson), cert. denied, No. 94C1803 (Ga. Nov. 18, 1994); *Indiana Consol. Ins. Co.* v. *Mathew*, 402 N.E.2d 1000, 1001-1002 (Ind. Ct. App. 1980) (lawnmower fire); *Baker* v. *Employers' Fire Ins. Co.*, 201 So. 2d 349, 350 (La. Ct. App. 1967) (fire from unknown origin); *Starks Food Markets* v. *El Dorado Refining Co.*, 134 P.2d 1102, 1103-1104 (Kan. Ct. App. 1943) (gasoline truck). The remaining decisions involved the repair of malfunctioning fuel tanks either by a non-mechanic, *Meridian Mut. Ins. Co.* v. *Purkey*, 769 N.E.2d 1179, 1180-1181 (Ind. Ct. App. 2002), or by mechanics who did not follow safe procedures, *Charter Oak Fire Ins. Co.* v. *Trio Realty Co.*, No. 99-10827, 2002 WL 123506, at *1, *5 (S.D.N.Y. Jan. 31, 2002) (a pilot light on a water heater that violated fire codes ignited gasoline during repair work on a fuel pump); *Glen Falls Ins. Co.* v. *Danville Motors, Inc.*, 333 F.2d 187, 188-189 (6th Cir. 1964) (fire began when mechanic negligently siphoned gas from leaky tank into open container); and *State ex rel. Cox* v. *Sims*, 77 S.E.2d 151, 154 (W. Va. 1953) (fire broke out while leaking gasoline was spread over large area of floor).

There is no reason to doubt that customs officials will continue to act appropriately to ensure that gas tank searches are performed competently and in a manner designed to protect the safety of their own employees participating in the search. Particularly in the absence of known instances of either error or injury at the border associated with a gas tank search, the Ninth Circuit was unjustified in concluding that a gas tank search was unreasonably dangerous or would unreasonably cause the motorist to fear for his safety. Absent a substantial basis for a concern that a motorist would be subjected to a significant risk of harm as a result of a gas tank search, the Ninth Circuit's unprecedented requirement of reasonable suspicion to open and search a gas tank is unfounded.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the court of appeals' decision should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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(5)

No. 02-1794

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MANUEL FLORES-MONTANO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that the federal government possesses the resources to prevent the entry into this country of illicit drugs and illegal immigrants and to ensure that alien terrorists and other criminals are excluded from the country. *See, e.g., Demore v. Kim*, 123 S. Ct. 1708 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). In particular, WLF has appeared in federal court proceedings to ensure the security of the border between the United States and Mexico. *See, e.g., Ambros-Marcial v. United States*, No. CIV-03-230 (dec. pending, D. Ariz.); *Defenders of Wildlife v. Meissner*, No. 99-2262 (D.D.C. 2000).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Amici are concerned that the decision below, if allowed to stand, threatens to undermine the ability of the federal government to take effective steps to prevent the entry into this country of terrorists' weapons, illicit drugs, and illegal aliens. By declaring the gas tanks of incoming vehicles off limits to random searches by customs officials, the Ninth Circuit has provided a road map to those seeking to circumvent border security measures. *Amici* do not believe that the drafters of the Fourth Amendment intended to create such a massive chink in our nation's armor.

Amici are filing this brief with the consent of both parties. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Amici hereby incorporate by reference the Statement contained in the Brief for Petitioner.

In brief, on February 12, 2002, Respondent Manuel Flores-Montano drove his automobile from Mexico to the Otay Mesa Port of Entry along the California border. Based on several factors, the Customs Inspector who examined Flores's car became suspicious that illicit drugs or other contraband might be secreted in the car's gas tank.[2] Flores was removed from the car, which was driven to a secondary inspection station. In less than an hour, Customs officials had obtained the services of a trained mechanic, raised Flores's car on a lift, removed the gas tank from the car, removed an access plate

[2] Nonetheless, the United States does not contend in this Court, and did not contend in the courts below, that its inspector had a "reasonable suspicion" that the gas tank contained drugs. Rather, it contends that its inspection of the gas tank did not require any such suspicion.

from the gas tank, and discovered 37 kilograms of marijuana secreted in the tank.[3]

Flores was arrested and charged with unlawfully importing marijuana and possession of marijuana with intent to distribute. Flores moved to suppress the marijuana discovered in the gas tank. He argued that the government lacked a "reasonable suspicion" that drugs were secreted in his gas tank and that *United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), had held that the Fourth Amendment prohibits Customs officials inspecting incoming vehicles at the U.S. border from removing a vehicle's gas tank in the absence of such a reasonable suspicion.[4] In response to the motion, the government said that it was not relying on "reasonable suspicion" as the basis for its search, but rather on a contention that *Molina-Tarazon* was wrongly decided.

Relying on *Molina-Tarazon*, the district court granted the motion to suppress on June 19, 2002. Pet. App. 2a-3a. In a brief, unpublished order, the Ninth Circuit summarily affirmed on March 14, 2003. The appeals court explained:

> A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further review. See *United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002);

[3] Had nothing illicit been found in the gas tank, the mechanic was prepared to reinstall the gas tank in a matter of minutes, and Mr. Flores could have been on his way.

[4] *Molina-Tarazon* held that removal of a gas tank for the purpose of inspection is a "nonroutine" search, and that those seeking to enter the United States are not subject to "nonroutine" searches in the absence of a "reasonable suspicion" that they may be carrying contraband. *Molina-Tarazon*, 279 F.3d at 717, Pet. App. 31a.

United States v. Hooton, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Pet. App. 1a.

SUMMARY OF ARGUMENT

In holding that the Fourth Amendment prohibits Customs officials from engaging in suspicionless searches at the international border unless the search can be classified as "routine," the Ninth Circuit has seriously misread this Court's case law. The Court has never separated border searches into distinct "routine" and "nonroutine" categories, with the propriety of the latter always being predicated on the government possessing some quantum of evidence that the search is likely to uncover contraband.

Rather, the Court has made clear that the same analytic framework applies to searches at the international border as applies to all other government searches: "[t]he permissibility of a [search or seizure] is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983)). Under that balancing approach, as the "routineness" of a random border search decreases, the greater must be the government's legitimate interests if the search is to pass Fourth Amendment muster. But the Court has *never* suggested that border searches that are pigeon-holed as "nonroutine" may never be conducted in absence of at least a "reasonable suspicion" that the search will uncover contraband.

In *Montoya de Hernandez*, the Court explained that in light of Congress and the Executive's broad power to police

the nation's borders, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Montoya de Hernandez,* 473 U.S. at 538. Thus, the Court explained, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* But in so holding, the Court was not setting aside a category of "routine searches" that are *exempt* from the normal Fourth Amendment balancing process. Rather, the Court's statement was simply a shorthand way of explaining that, under the normal Fourth Amendment balancing process, the most routine of border searches will never violate the Fourth Amendment even when conducted without reasonable suspicion, because such searches do not constitute an "intrusion on the individual's Fourth Amendment interests."

The search conducted in this case -- the removal of a car's gas tank in order to search it for contraband -- is obviously a somewhat more intrusive search (and thus somewhat less "routine") than, say, an inspection of the contents of luggage in the car. But it is significantly less intrusive (and more "routine") than, say, disassembling the car to the last o-ring. It makes little sense to decide Fourth Amendment issues of this sort by deciding which of the two extremes more closely resembles the challenged search, thereby determining whether the challenged search should be placed into the "routine" bin or the "nonroutine" bin. Rather, the reasonableness of the search conducted in this case should be determined by balancing the intrusiveness of the search against the government's interest in conducting such searches in order to protect border security. By focusing solely on the routine/nonroutine issue, the Ninth Circuit failed to undertake the required balancing.

If the proper balancing process is undertaken, there can be little doubt that the search of Flores's car complied with the Fourth Amendment. The government has demonstrated without contradiction that: (1) a significant percentage of contraband being smuggled across the border is secreted in gas tanks; (2) removal and disassembly of the gas tank often is the only effective means of determining whether the gas tank contains contraband; (3) other law enforcement techniques may cause Customs officials to suspect that a car contains contraband, but the evidence may often (as here) fail to reach the "reasonable suspicion" level; and (4) removing and inspecting gas tanks, either randomly or based on something less than reasonable suspicion, significantly reduces the flow of contraband across the border, both because it often leads to the interdiction of contraband and because it deters others from smuggling contraband in the same manner. While the government's actions intruded on Flores's rights to some degree (*e.g.*, it delayed him for one hour and created some slight risk of damage to his car), that intrusion is not sufficiently serious to outweigh the government's interest in conducting such searches.

In this case, the contraband discovered by Customs officials was an illegal drug. But gas tanks can also be used for smuggling items even more dangerous than drugs. For example, terrorists could well decide to smuggle weapons of mass destruction into this country in a car's gas tank, if they believed that Customs officials were barred by the Fourth Amendment from conducting random searches of gas tanks. At a time when the need to secure the nation's border is greater than ever, now is not the appropriate time for the Courts to be tying the hands of those charged with carrying out that task.

ARGUMENT

I. THE NINTH CIRCUIT IMPROPERLY FAILED TO CONSIDER THE GOVERNMENT'S STRONG INTEREST IN SEARCHING GAS TANKS TO PREVENT THE ENTRY OF CONTRABAND

A. The Fourth Amendment's Balance of Reasonableness Is Qualitatively Different at the International Border Than in the Interior

It is of overriding significance in this case that the search of which Flores complains occurred at the nation's border as he was attempting to enter from Mexico. The Fourth Amendment protects against "unreasonable" government searches and seizures, but the scope of what constitutes a "reasonable" search has long been recognized to be far broader when the search occurs at the border than when it occurs elsewhere. As the Court has explained:

> That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration. . . . There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself.

United States v. Ramsey, 431 U.S. 606, 616, 619 (1977).

To be sure, the Court has imposed some Fourth Amendment limitations on searches and seizures at the border. For example, if the government wishes to *detain* a traveler for an extended period of time because it suspects that the individual is smuggling contraband in his/her alimentary canal, the Fourth Amendment requires that the government have at least a "reasonable suspicion" of the smuggling activity. *Montoya de Hernandez,* 473 U.S. at 541. But even then, the Court declined to impose on the government the higher evidentiary burdens proposed in that case by the lower court (a "clear indication") and the respondent ("probable cause"). Moreover, the Court made clear that although those seeking to enter the country are entitled to be free from "unreasonable" searches and seizures, "not only is the expectation of privacy less at the border than in the interior, . . . the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." *Id.* at 539-40.

Flores was not subjected to the extended detention at issue in *Montoya de Hernandez*. Rather, his car was subjected to a nondestructive search procedure that was completed in one hour. He nonetheless asserts that the Fourth Amendment demands the same quantum of evidence ("reasonable suspicion") that was required of the government in order to hold Ms. Montoya de Hernandez incommunicado for 16 hours under constant surveillance. Nothing in this Court's case law demands such a result.

B. The Court Has Never Categorically Restricted the Government's Power to Engage in Suspicionless Border Searches to Those Instances in Which the Search Is Minimally Intrusive

The Ninth Circuit recognizes that, notwithstanding the Fourth Amendment, the government has broad authority to engage in suspicionless, warrantless searches of those seeking to enter the country. *See, e.g.*, Pet. App. 21a. It nonetheless insists that only "routine" searches are authorized by "[t]he border search exception" and, "[i]n order to conduct a search that goes beyond the routine, an inspector must have a reasonable suspicion that the person to be searched may be carrying contraband." *Id.* at 21a-22a. Because it deems the removal and search of a vehicle's gas tank for contraband to be a "nonroutine" search, it held that the search in this case in the absence of "reasonable suspicion" violated the Fourth Amendment. *Id.* at 1a.

The Ninth Circuit's division of border searches into two mutually exclusive categories for purposes of Fourth Amendment analysis -- "routine" and "nonroutine" -- finds no support in the Court's case law. Rather, this Court has held that "[t]he permissibility of a [search or seizure] is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Montoya de Hernandez*, 473 U.S. at 537 (quoting *Villamonte-Marquez*, 462 U.S. at 588). Obviously, a search that is less "routine" (*i.e.*, one that intrudes to a greater extent on an individual's legitimate expectations of privacy) may intrude to a greater extent on the individual's Fourth Amendment interests. But even so, a less "routine" random search will not violate the Fourth Amendment if that intrusion is outweighed by the government's interest in conducting such searches. The Court has *never* suggested that border searches

that are pigeon-holed as "nonroutine" may not be conducted in the absence of at least a "reasonable suspicion" that the search will uncover contraband.

In *Montoya de Hernandez*, the Court explained that in light of Congress and the Executive's broad power to police the nation's borders, "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Montoya de Hernandez,* 473 U.S. at 538. Thus, the Court explained, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* But in so holding, the Court was not setting aside a category of "routine searches" that are *exempt* from the normal Fourth Amendment balancing process. Rather, the Court's statement was simply a shorthand way of explaining that, under the normal Fourth Amendment balancing process, the most routine of border searches will never violate the Fourth Amendment even when conducted without reasonable suspicion, because such searches do not constitute an "intrusion on the individual's Fourth Amendment interests."[5]

Border searches come in many forms, each entailing a different level of intrusiveness (or "routine-ness"). The search conducted in this case -- the removal of a car's gas tank in order to search it for contraband -- is obviously a somewhat

[5] The Court stated that it was "suggest[ing] no view on what level of suspicion, *if any*, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches." *Id.* at 541 n.4 (emphasis added). Accordingly, the Court could not have intended its decision to prohibit suspicionless "nonroutine" border searches; if the Court had intended such a prohibition, it would not have included the "if any" language in its description of the level of suspicion required for what it deemed "nonroutine" border searches.

more intrusive search (and thus somewhat less "routine") than, say, an inspection of the contents of luggage in the car. But it is significantly less intrusive (and more "routine") than, say, disassembling the car to the last o-ring. It makes little sense to decide Fourth Amendment issues of this sort by deciding which of the two extremes more closely resembles the challenged search, thereby determining whether the challenged search should be placed into the "routine" bin or the "nonroutine" bin. Rather, the reasonableness of the search conducted in this case should be determined by balancing the intrusiveness of the search against the government's interest in conducting such searches in order to protect border security. By focusing solely on the routine/nonroutine issue, the Ninth Circuit failed to undertake the required balancing.

Judicial treatment of x-ray screening devices well illustrates that somewhat intrusive and suspicionless searches do not violate the Fourth Amendment so long as they serve sufficiently important government interests. This Court has labeled use of an x-ray as a "nonroutine" search. *Montoya de Hernandez*, 473 U.S. at 541 n.4. Nonetheless, their use at public airports is universally accepted because they serve a vital public safety need. *See, e.g., Torbet v. United Airlines, Inc.*, 298 F.3d 1087 (9th Cir. 2002) (Fourth Amendment does not prohibit suspicionless search of baggage at airport terminal, even if owner seeks to leave airport rather than undergo search). On the other hand, the courts would be very unlikely to tolerate a law requiring individuals to pass through an x-ray device as a condition for receiving permission to walk down a public street. The government interests promoted by such a system would likely be deemed insignificant in comparison to the burden on Fourth Amendment rights.

In his opposition to the certiorari petition, Flores contends that "every Circuit court that has considered this

issue has . . . held that if the search is nonroutine, then the applicable standard is reasonable suspicion." Opp. Cert. 25. Not true. Of the six decisions from appeals courts outside the Ninth Circuit cited by Flores, only *United States v. Rivas,* 157 F.3d 364 (5th Cir. 1998), adopted the same standard adopted by the Ninth Circuit in *Molina-Tarazon*. The other decisions are distinguishable.[6] Indeed, one of the appeals court decisions cited by Flores, *United States v. Oyekan*, 786 F.2d 832 (8th Cir. 1986), appears to reject the *Molina-Tarazon* standard. *Oyekan* required the Eighth Circuit to address the issue left open by this Court in *Montoya de Hernandez*: what level of suspicion, if any, is required for "nonroutine" border searches such as strip, body cavity, or involuntary x-ray

[6] *United States v. Robles*, 45 F.3d 1 (1st Cir.), *cert. denied*, 514 U.S. 1043 (1995), did not address whether all "nonroutine" border searches required a showing of "reasonable suspicion." Rather, the government *conceded* that it was required to demonstrate "reasonable suspicion" to justify its having drilled a hole in a metal cylinder shipped from Colombia, 45 F.3d at 12; the court held that the government met that standard. In *United States v. Johnson*, 991 F.2d 1287 (7th Cir. 1993), the Seventh Circuit upheld the routine search of the luggage of a woman arriving on an overseas flight. The issue of "nonroutine" searches never arose in the case, and the appeals court only briefly touched upon that subject in *dicta*. In *United States v. Carreon,* 872 F.2d 1436 (10th Cir. 1989), the Tenth Circuit upheld a border search consisting of drilling a hole in the wall of a camper. The court said that the Customs inspector had a "reasonable suspicion" that drugs were secreted in the camper (and overturned a district court decision that had suppressed drug evidence because the search was not supported by "probable cause"); but the court never specifically addressed whether "reasonable suspicion" was required, let alone whether "reasonable suspicion" is always required for "nonroutine" searches. In *Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002), the Third Circuit held that Customs officials did not need "reasonable suspicion" to pat down the clothing of a woman arriving at the airport from Jamaica; the court *never discussed* whether all "nonroutine" searches required "reasonable suspicion."

searches. The Eighth Circuit determined that the Fourth Amendment required "reasonable suspicion" for such searches. *Oyekan*, 786 F.2d at 837. But the court arrived at that determination by employing the normal Fourth Amendment balancing process, *not* by automatically imposing a "reasonable suspicion" requirement on all border searches classified as "nonroutine." *Id.* at 836.

Flores asserts that the balancing approach traditionally applied in Fourth Amendment cases is inappropriate here because it would lead to unpredictability in the law. Cert. Opp. 26 (citing *Montoya de Hernandez*, 473 U.S. at 541, for the proposition that "subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question."). That citation is inapposite. In the quoted phrase, the Court was criticizing the Ninth Circuit's creation of a third level of suspicion ("clear indication") in addition to the two levels of suspicion already recognized by the Court ("reasonable suspicion" and "probable cause"). *Amici*'s suggestion that border searches be subject to the balancing approach traditionally applied in Fourth Amendment cases will not, if adhered to in this case, require the Court to adopt any new verbal formulas. Rather, depending on the balance between the degree of the search's intrusiveness and the importance of the government interests being served by the search, one of three legal conclusions can be reached regarding any border search: either the government may proceed without any suspicion that it will find contraband, or it may proceed only with reasonable suspicion, or it may proceed only with probable cause.

C. The Government's Interest in Removing and Inspecting Gas Tanks Even in the Absence of "Reasonable Suspicion" Far Outweighs Flores's Fourth Amendment Interest in Preventing Such Actions

The Court has mandated that all Fourth Amendment claims are to be judged under the balancing approach described above. *Montoya de Hernandez*, 473 U.S. at 537. The Ninth Circuit erred in failing to conduct that balancing process, and its decision is subject to reversal on that ground alone.

Because of the importance of the issue raised in the case and the need for guidance in the courts of appeals, *amici* submit that the Court should undertake the balancing process on its own, rather than simply remanding the case to the Ninth Circuit. It is particularly appropriate for the Court to do so here, because the balance tips so decided in the government's favor.

The important government interests served by removing and inspecting gas tanks at border check points even in the absence of "reasonable suspicion" are well documented in the various declarations submitted by the government in opposition to the motion to suppress. Most notably, the government has demonstrated that smuggling contraband into the country in gas tanks is a very common occurrence:

> Over the past five and a half years, gas tank drug seizures have accounted for approximately 25% (24.58) of *all* vehicle drug seizures. Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles.

Declaration of Jason P. Ahern, Director of Field Operations for the Southern California Customs Management Center, ¶ 4. Pet. App. 12a.

Moreover, the government has demonstrated that removal and disassembly of the gas tank often is the only effective means of determining whether the gas tank contains contraband; that Customs officials may often have reason to suspect that a vehicle's gas tank contains contraband, yet their suspicion may not rise to the level of a "reasonable suspicion"; and allowing the removal and inspection of gas tanks, either randomly or based on something less than reasonable suspicion, significantly reduces the flow of contraband across the border both because it often leads to the interdiction of contraband and because it deters others from smuggling contraband in the same manner. *Id.* at ¶¶ 6, 8, Pet. App. 12a-13a; Declaration of Diane Hinckley ¶ 6, Pet. App. 16a-17a.

These significant government interests in suspicionless removal and inspection of gas tanks far outweigh the relatively slight burden imposed on Flores as a result of the government's actions in his case. The removal of his gas tank delayed Flores for about an hour and imposed a slight risk of damage to his car.[7] Those burdens no doubt are somewhat greater than the burdens imposed by other routine types of searches by Customs officials (*e.g.*, opening luggage). But the search of inanimate objects (such as a gas tank) are virtually always going to be far less objectionable to a property owner than would be a search of his person -- yet even the Ninth Circuit permits suspicionless border searches of pockets, shoes, and the outside of clothing being worn by travelers. Pet. App.

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[7] Mr. Ahern's declaration indicates that if any damage occurs, Customs officials will instruct vehicle owners on how to present compensation claims to the government. Pet. App. 13a.

22a.[8] In light of the government's strong showing regarding the need for suspicionless removal and inspection of gas tanks, the rather slight intrusiveness of such searches is insufficient to brand such searches "unreasonable" under the Fourth Amendment.

II. THE DECISION BELOW THREATENS TO UNDERMINE THE GOVERNMENT'S ABILITY TO TAKE EFFECTIVE MEASURES TO PREVENT TERRORISM

In this case, the contraband discovered by Customs officials was an illegal drug. But gas tanks can also be used for smuggling items even more dangerous than drugs. For example, terrorists could well decide to smuggle weapons of mass destruction into this country in a car's gas tank, if they believed that Customs officials were barred by the Fourth Amendment from conducting random searches of gas tanks. At a time when the need to secure the nation's borders is greater than ever, now is not the appropriate time for the Courts to be tying the hands of those charged with carrying out that task.

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[8] *Amici* do not mean to suggest that a suspicionless border search of an inanimate object could *never* be so intrusive as to constitute a Fourth Amendment violation. For example, the Ninth Circuit worried that if it upheld the suspicionless removal and inspection of gas tanks as "routine," then "it would mean that customs agents at the border could, acting on no suspicion, order a car disassembled down to the last o-ring, and hand it back to the owner in a large box." Pet. App. 23a. But such searches would be *highly* intrusive and thus could not withstand Fourth Amendment challenge unless the government could demonstrate that the burden on the car owner was outweighed by an *extremely* strong government interest that could not be accomplished without such complete disassembly.

The Department of Homeland Security has been working tirelessly in recent months to tighten the nation's borders to prevent terrorist attacks within the United States. Any ruling from this Court that restricts the Department's authority to conduct suspicionless border searches is likely to set back border-tightening efforts. For example, the Department recently announced rules designed to reduce the ability of terrorists to import weapons in one of the more than seven million cargo containers shipped into this country each year. New York Times, "U.S. Plans to Toughen Rules for Cargo Shipping Industry"(Nov. 19, 2003) at A25. The rules require shippers to install electronic tamper sensors and reinforced metal seals on cargo containers. Shippers who fail to comply are threatened with onerous, suspicionless inspections. A decision affirming the decision below would call into question the government's power to conduct such inspections.

The Department has recently deployed along the border 24 x-ray trucks capable of scanning entire tractor-trailers to search for weapons. *See* Testimony of Robert C. Bonner, Commissioner of U.S. Bureau of Customs and Border Protection, before the House Select Committee on Homeland Security, Subcommittee on Infrastructure and Border Security (Oct. 16, 2003). If the Ninth Circuit is correct that the border exception only permits suspicionless searches that are of the most "routine" nature, then the Department's use of its x-ray trucks is subject to challenge.

In a recent border search case, the Third Circuit stated, "[I]t is beyond peradventure, as the Seventh Circuit has noted, that 'the events of September 11, 2001, only emphasize the heightened need to conduct searches' at our border." *Bradley*, 299 F.3d at 202 (quoting *United States v. Yang*, 286 F.3d 940, 944 n.1 (7th Cir. 2002)). Congress "has granted the Executive plenary authority" to police the nation's borders to prevent the

introduction of contraband. *Montoya de Hernandez*, 473 U.S. at 537. In the absence of evidence that the Executive is abusing that authority, the courts should not be second-guessing the Executive's efforts to carry out its mandate.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MANUEL FLORES-MONTANO,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion to remove, disassemble, and search a vehicle's fuel tank for contraband; *i.e.,* is removing and disassembling a vehicle gas tank a "routine search" at the border that does not require reasonable suspicion?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL; www.nacdl.org) is the preeminent bar organization advancing the mission of America's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has nearly 11,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization on its House of Delegates. The International Bar Association recognizes NACDL as an affiliate organization.

NACDL promotes study and research in the field of criminal law. In furtherance of its objectives over the past 15 years, NACDL annually files approximately ten amicus briefs with this Court on criminal justice and personal privacy issues.

The parties have consented to the filing of this Amicus brief on behalf of the Respondent, and the letters of consent should already be filed with the Clerk.

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for a party authored any part of this brief. No person or entity other than Amicus made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6, Amicus is a nonprofit corporation. It has no parent corporation, it is not a publicly held corporation, nor does a publicly held company own 10% or more of its stock.

SUMMARY OF THE ARGUMENT

This case concerns the breadth of the power of the Government to conduct suspicionless border searches of vehicles, including dismantling parts of them, without reasonable suspicion. The Government relies on the common law and customs statutes passed at the time of the framing of the Fourth Amendment. The statutes provide no clear answer, and the common law strongly suggests that a search of this intensity without cause was unreasonable. If the Court finds the common law answer unclear, the Court must then turn to a reasonableness inquiry, which is informed by the changing of time and technology. From either perspective, Respondent should prevail.

While the framers did not anticipate automobiles, Amicus submits that the common law at the time of the framing of the Fourth Amendment would not support such a search. Searches of this nature of ships were loathed by the colonists. The seizing of John Hancock's sloop *Liberty* led to a riot in Boston, and colonists were aware of, and despised, similar searches in all the colonies. In that same time period, customs officers were ordered off ships at gunpoint and one was harpooned for exceeding their common law authority by searching for dutiable goods below deck before the cargo reached the docks. The instructions from England were that force was only permitted to meet resistance to the search for dutiable goods, not to break and enter private areas.

The original customs acts of 1789 and 1790 spoke only to searching for goods, not breaking to retrieve them. Nothing in the history of those acts or the common law

supports the breadth of search sought by the Government in this case.

This Court's modern case law on border searches has distinguished between "routine" and "non-routine" searches. The intensity of the search determines whether it is "routine." The Government argues that, since a mere vehicle is involved, virtually anything it wants to do to it is routine. It relies on the slimmest of anecdotes to state that removal of gas tanks is "simple and easy." It is not – it is an involved process varying greatly by the construction of the vehicle involved, and it is potentially dangerous because gasoline fumes are always present and they create a danger of fire. Some cars have to have new parts installed when disassembled. At least one requires also disassembling the braking system of the car and lowering the rear axle. Finally, the CDC notes that gasoline is likely carcinogenic because of the 150 chemicals added to gasoline, and those working around gasoline should wear gloves and avoid breathing the vapors.

Gathering reasonable suspicion at the border today does not require an intensive search. A customs officer can tap on the gas tank to hear if it sounds like it contains fuel or solid objects, and dogs can sniff vehicles as they pass through customs. They did that here.

Technological advances, moreover, make it possible to search a gas tank for contraband without removing it. For years, the Government has used vehicle x-rays, density meters, and fiber optic scopes that are far less intrusive than removing a gas tank, something that the Government concedes produced nothing 7.5% of the time apparently even with reasonable suspicion.

By tapping the tank or looking inside with their own technological devices, they can insure that gas tank removals are founded on reasonable suspicion. When basic technology has overtaken the knowledge of the framers, we should look to that technology for the answer, and that answer here is that manual removal of a gas tank to search it without reasonable suspicion is unreasonable.

The Court has never foreclosed looking to the availability of less intrusive measures as an element of reasonableness. This is a case where the intensity of the search can readily and more easily be ameliorated by a less intrusive measure that actually saves the government time, expense, and manpower and protects the innocent motorist from unwarranted delays in crossing the border where an officer decides to search a gas tank without suspicion.

ARGUMENT

THE SEARCH OF A VEHICLE GAS TANK BY REMOVING IT IS NOT A "ROUTINE BORDER SEARCH" WHICH CAN OCCUR WITHOUT REASONABLE SUSPICION.

A. Introduction

The parties have more than adequately addressed the justification for the border search exception in the context of the facts of this case, so Amicus will not belabor it here. The crux of this case is: whether removing a gas tank from

an automobile without reasonable suspicion[2] there is contraband inside is a "routine border search" or otherwise "reasonable" under *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-38 (1985); *see United States v. Ramsey*, 431 U.S. 606, 615 (1977). If it is not a "routine border search," then reasonable suspicion is required. *Montoya de Hernandez*, 473 U.S. at 541.

No one doubts the power of the Government to search (including dog sniff) at the border of luggage,[3] shipping containers, mail,[4] trunks of cars,[5] backs of trucks, and cargo of ships[6] to look for dutiable goods, contraband, or illegal aliens "to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." *Ramsey*, 431 U.S. at 620.

Montoya de Hernandez found the detention of an alimentary canal drug smuggler for the duration of necessary body functions was not a routine border search, but it was reasonable and conducted with reasonable suspicion, and the delay and obvious discomfort she endured was,

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[2] The Government has expressly waived reliance on reasonable suspicion in the District Court, the Court of Appeals, and here, and it is bound by that now.

From the facts, however, it is obvious that there was reasonable suspicion by the fact the gas tank sounded solid and a drug dog alerted to the vehicle. Br.U.S. at 3.

[3] *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971).

[4] *Ramsey, supra.*

[5] *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) (*dicta*); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

[6] *Boyd v. United States*, 116 U.S. 616, 623 (1886).

however, caused by her own actions in choosing to secrete drugs within her body. *Id.* at 544.

What is a "routine border search"? The answer is not always obvious, but the Government's historical power did not go as far as the Government suggests. Indeed, history indicates that this breadth of suspicionless border search was prohibited. The distinction between routine and non-routine searches is a balance struck between the needs of law enforcement and privacy. The Government suggests that it "must have wide latitude to remove and, if necessary, to disassemble a vehicle's gas tank to deter and detect illegal smuggling into the country." Br.U.S. at 16. But, this is precisely what the border search exception already provides, since the Government has always had the power to make routine searches with no suspicion, and more intensive, non-routine searches with reasonable suspicion. The Government's language suggests some sort of exigency, but the border search exception is "not based on the doctrine of 'exigent circumstances' at all." *Ramsey*, 431 U.S. at 621.

The Government cannot show that disassembling a vehicle is "routine" under either an historical view or a reasonableness analysis. An analysis of both may ultimately be required in this case.

B. The Common Law and historical basis for customs searches

1. Application of the Common Law and "Reasonableness."

In *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999), the Court said:

> In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. *See Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *California v. Hodari D.*, 499 U.S. 621 (1991). Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995).

See also Kyllo v. United States, 533 U.S. 27, 40 (2001) ("we must take the long view, from the original meaning of the Fourth Amendment forward"). In *Wilson*, 514 U.S. at 431, the Court said:

> In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. *See California v. Hodari D.*, 499 J.S. 621, 624 (1991); *United States v. Watson*, 423 U.S. 411, 418-420 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925). "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment.

The Court has also said that it has not frozen into law the Fourth Amendment as it existed in 1791. *Payton v.*

New York, 445 U.S. 573, 591 n. 3 (1980), quoted in *Steagald v. United States*, 451 U.S. 204, 218 n. 10 (1981), and *Tennessee v. Garner*, 471 U.S. 1, 13 (1985). And, where there is no common law guidance, "reasonableness" must be read in light of changing circumstances of modern times. "Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry." *Garner*, 471 U.S. at 13 (common law sanctioned killing fleeing nonviolent felons, but "changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied"; *id.* at 15).

When technology overtakes the common law, as will be seen has happened here, *Garner* requires us to look to technology for the answer. Here, technology obviates the need for suspicionless gas tank removal because the government can get its reasonable suspicion with minimal effort.

2. Nothing in the Common Law sanctions this kind of "breaking" or intensive search without suspicion.

At common law, this kind of "breaking" of property for a border search was not sanctioned.

As Respondent notes, Cuddihy states that colonists treated their ships as well as houses as their castles. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, at 362-63 & 1215 (1990). The infamous search and seizure of John Hancock's sloop *Liberty* in May 1768 engendered great resentment in the colonies, but it was obvious that it was the culmination

of a building resentment over unrestrained searches and seizures and breakings of containers and ships by customs officials and naval officers up and down the colonial coastline. *Id.* at 1216-19.[7] One month earlier, a customs officer went below deck of Hancock's *Lydia*, and Hancock had him brought up at gunpoint telling him that, while they could assess the cargo on the dock,[8] customs officers had no business searching his ship. After the seizure of the *Liberty*, a "small riot" ensued, and one customs officer had his boat burned and others were chased off by a band of Hancock supporters. Finally, the *Liberty* was returned to Hancock. The story and importance of the seizure of the *Liberty* was only touched on in passing by CUDDIHY, but it is discussed at length in 2 LEGAL PAPERS OF JOHN ADAMS 173-210 (Atheneum 1965) because John Adams represented Hancock in the suit over the seizure of the *Liberty*. The gist of Adams's account is that the law at the time required customs officers to have suspicion to search. Also, the infamous writs of assistance were intertwined with customs searches; JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 30 (1966); and, Amicus

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[7] "A Pennsylvanian lamented that naval officers and degenerated into 'pimping tidewaiters' who scoured every harbor and creek in the colonies with armed force, detained everything afloat from fishing smacks to wood boats, tumbled their cargoes, and inspected even their ballast." CUDDIHY at 1217.

CUDDIHY also writes of customs officer Henry Panton harpooned in the jugular by outraged crewmen when his customs search apparently turned pretextual. *Id.* at 1218-19.

Interestingly, CUDDIHY also writes of customs officers searching for flammable goods and gunpowder with an open flame. *Id.* at 1216. *See infra.*

[8] *Compare id.* at 1216.

submits, that indicates a common law requirement of probable cause or at least reasonable suspicion. At the minimum, reasonableness was always required. Harris J. Yale, Note, *Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception*, 11 HOFSTRA L. REV. 733, 748 n. 122 (1983). As Respondent notes in his brief, general instructions from England were "to do no more than" enter upon a ship and diligently search, and force was only permitted to meet resistence. Resp.Br., Part C.4, quoting 4 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 164 (1938).

3. Nothing in the first customs acts sanctions this kind of breaking.

In *Ramsey*, 431 U.S. at 616-17 n.12, the Court discussed Act of July 31, 1789, 1 Stat. 29, adopted at the time of the adoption of the Fourth Amendment, and it noted that § 23 of the Act granted Customs agents power to open packages in the presence of "two or more reputable merchants." Section 24 of the Act noted that Customs officers had the power to board vessels and search for goods subject to duty, "but if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only)."

In *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Court analyzed the successor statute, Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145, 164, quoted in Resp.Br. Part C.2., which became 19 U.S.C. § 1581(a) which permits customs officers to board any vessel or

vehicle "and examine, inspect, and search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance." Contextually, "compel compliance" refers to "hail and stop." The question is what does "search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board" encompass? Section 31 talks about sealing containers for later inspection, but not any breaking. Respondent notes that 19 U.S.C. § 1461 "contemplates opening a 'closed vehicle' with a key." Resp.Br., Part C.2. n.20. This common law history militates against granting the Government a general power to break and disassemble at the border.

Nothing in the history of the Fourth Amendment, the customs statutes, or the Common Law supports the Government's position that such an intrusive breaking as here can occur without reasonable suspicion. Section 48 of the 1790 Act used the phrase "reason to suspect" dutiable goods were being concealed as grounds to search a vessel, and "reason to suspect" today means "probable cause." Resp.Br. Part C.2., citing *Wyoming v. Houghton,* 526 U.S. at 300, and *Vernonia,* 515 U.S. at 670-71 (O'CONNOR, J., dissenting) and noting Justice O'CONNOR "cit[ed] the identical language in the Collection Act of July 31, 1789, § 24, 1 Stat. at 43[ ]. Thus, it appears that the first Congress required probable cause for the most intrusive search it authorized, a higher standard than the Court of Appeals applied here," or any court of appeals in any case involving gas tank removals.

C. Routine v. Non-Routine and Fourth Amendment Reasonableness

1. Introduction.

As noted above, Fourth Amendment reasonableness is always an issue, even in a border search. *Montoya de Hernandez*, 473 U.S. at 538. Reasonableness is the "touchstone"[9] or "fundamental inquiry"[10] in Fourth Amendment cases. "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Robinette v. Ohio*, 519 U.S. 33, 39 (1996); *accord Delaware v. Prouse*, 440 U.S. 648, 655 (1979) (reasonableness must be viewed objectively lest privacy be "subject to the discretion of the officer in the field").

Since any reliance on reasonable suspicion has been expressly disavowed in this case, this search was not reasonable under all the circumstances, in light of the lack of reasonable suspicion which must be taken as a given.

2. Gas Tank Searches Are Not a Minimal Intrusion and, Therefore, Not "Routine" – The Work Is Inherently Dangerous If Not Done Safely or Correctly.

The Government asserts, without any contemporary reading or factual investigation, that "[t]he procedure involved in a gas tank search also involves no extraordinary intrusion on either the individual or his vehicle. The

[9] *Robinette v. Ohio*, 519 U.S. 33, 39 (1996), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

[10] *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Griffin v. Wisconsin*, 483 U.S. 873 (1987).

disassembly and removal of a gas tank is a relatively easy and straightforward procedure that may be readily performed by automobile mechanics." Br.U.S. at 25. The Government presents the Court with four websites with personal anecdotes in "chat-type" postings by shadetree mechanics that removal of particular gas tanks is "relatively easy and straightforward." *Id.* at 25-26 n. 5. The Government completely overlooks the host of reported cases involving gasoline fires in garages occurring under similar circumstances.[11] And, if its contract mechanic is responsible for a gasoline fire, who pays? Does the Government's discretionary function exemption to the Federal

[11] The number is too great to cite, and they have been around as long as there have been automobiles. Just a few give the flavor: *see, e.g., Glenns Falls Ins. Co. v. Danville Motors, Inc.*, 333 F.2d 187 (6th Cir. 1964) (garage gasoline fire burned down apartment building); *Charter Oak Fire Ins. Co. v. Trio Realty Co.*, 2002 WL 123506 (S.D.N.Y. 2002) (gasoline spilled to floor and was ignited by pilot light of hot water heater); *Meridian Mut. Ins. Co. v. Parkey*, 769 N.E.2d 1179 (Ind. App. 2002) (fumes ignited while gas was being syphoned from tank); *Stephens v. State*, 214 Ga. App. 183, 447 S.E.2d 26 (1994) (arson utilizing gasoline vapor from car); *Indiana Consol. Ins. Co. v. Mathew*, 402 N.E.2d 1000 (Ind. App. 1980) (just filled lawn mower caught fire in garage after being started); *Starks Food Markets v. El Dorado Refining Co.*, 156 Kan. 577, 134 P.2d 1102 (1943) (gas tank being filled from tanker truck caught fire); *Baker v. Employers' Fire Ins. Co.*, 201 So.2d 349 (La. App. 2d Cir. 1967) (gasoline fire on car on front-end alignment rack; gas tank exploded when fire department tried to move car out of garage in an attempt to save building).

Remarkably, something as benign and as omnipresent as a garage mechanic's "creeper," a device for a mechanic to roll under a car on his or her back to do repairs or inspect without lifting the car, caused a spark that ignited gasoline fumes and destroyed a state owned garage and the adjoining business and it contents in 1948. *State ex rel. Cox v. Sims*, 128 W.Va. 482, 77 S.E.2d 151 (1953). Creepers have metal wheels, the floor was concrete, and that combination created a spark source.

Tort Claims Act protect it from liability, or must the vehicle owner look to his or her own insurance, *if* the owner happens to have coverage for such an event?

Amicus invites the Court to read the three Internet postings proffered by the Government that are still online (as of January 10, 2004, one was missing[12]): the newest car referred to in the first citation involves a 1974 Porsche 914, but the "easy task" has two screens of directions[13]; the third reference was to removing the gas tank in a 1959 Ford; and the last, www.1inamillioncars.com, referred to a 1965 Ford that the poster was also trying to sell. The Government provided nary a word from a professional mechanic. Professional mechanics, as will be seen, require far more.

Amicus's counsel went to a Barnes & Noble store for a couple of hours in early January 2004, and stood in the section on automobile repair perusing a few dozen Chilton Repair Manuals. Chilton is the ultimate publisher of automobile repair manuals, and they have published manuals for decades for virtually all basic cars sold in America. All the Chilton repair manuals have one of two warnings about removing fuel tanks. The predominant, more current ones state, with bold face and italic in the original:

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[12] The second citation, within www.c3sharktank.com, came up as "404 Page Not Found," and a search of the website could not locate the reference either.

[13] The end of the directions also state: "Finally, make sure you do this in an area free from sparks or other source of ignition, as you will be working with an open tank of gasoline. To be safe, it is also not a bad idea to disconnect the battery." The Government left those critical facts out in describing it as a "relatively easy and straightforward procedure."

> **Warning:** *Gasoline is extremely flammable so take extra precautions when you work on any part of the fuel system. Don't smoke or allow open flames or bare light bulbs near the work area, and don't work in a garage where a natural gas-type appliance (such as a water heater or a clothes dryer) with a pilot light is present. Since gasoline is carcinogenic, wear latex gloves when there's a possibility of being exposed to fuel, and, if you spill any fuel on your skin, rinse it off immediately with soap and water. Mop up any spills immediately and do not store fuel-soaked rags where they could ignite. The fuel system is under constant pressure, so, if any fuel lines are to be disconnected, the fuel pressure in the system must be relieved first. When you perform any work on the fuel system, wear safety glasses and have a Class B type fire extinguisher on hand.*

Chilton's earlier warnings state:

> **Caution:** Observe all applicable safety precautions when working around fuel. Whenever servicing the fuel system, always work in a well-ventilated area. Do not allow fuel spray or vapors to come in contact with a spark or open flame. Keep a dry chemical fire extinguisher near the work area. Always keep fuel in a container specifically designed for fuel storage; also, properly seal the fuel containers to avoid the possibility of fire or explosion.[14]

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[14] *See, e.g.*, Chilton, General Motors, Chevy Mid-Size Cars, 1964-88 Repair Manual (1994), Ch. 5, p. 52-54 (repeating the warning *five* times in three pages):

(Continued on following page)

The Chilton series notes that most automobiles built since the late 1990's have plastic gas tanks that must be replaced if even *slightly* damaged.[15] Some require that new seals be installed whenever the parts of the tank are removed.[16] Some state that gasoline spillage will necessarily

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→ Be sure to store the fuel tank in a cool dry area out of direct sunlight. Keep any source of flame away from the tank[.] [E]ven though it has been drained of most fuel, there is likely an [*sic*] large amount of flammable vapors still stored in the gas tank.

[15] *See, e.g.*, Chilton, VW/Audi, Passat 1998-01, A4 1996-01 Repair Manual (2001), Ch. 4, §§ 1 & 6 (these fuel tanks are not repairable – they must be replaced if even slightly damaged); Chilton, Chrysler LHS, etc., 1998-2001 (2002), Ch. 4, § 6(1) (same).

[16] Chilton, General Motors DeVille/Fleetwood/El Dorado/Seville 1990-98 Repair Manual (2000), Ch. 5, p. 9, step 9.

This begs the question of whether the Government's contract mechanics bring the parts or must send for them when they find out that parts also need to be replaced, thereby unnecessarily extending the stop even longer. Since the Government admits that 348 gas tank searches in Southern California during the relevant time period were fruitless (because they rely on no suspicion at all), Br.U.S. at 31, the search and seizure is extended by the time it takes to secure the parts to correctly complete the repairs, depending upon whether the Government chooses to do the repairs completely or send the motorist on his or her way with a defective fuel system that will leak, only to later cause a fire away from the border.

With 4,619 drug seizures from gas tanks, Br.U.S. at 16, that gives the Government a 92.5% success ratio *when they presumably have reasonable suspicion*. If the Government was following the appellate court decisions requiring reasonable suspicion, then 7.5% of the time the reasonable suspicion was wrong. In percentages, it sounds effective, but, in raw numbers, the occupants of 348 vehicles, potentially a thousand people, were severely inconvenienced.

Here, the Government wants it all, to be able to conduct these searches even without reasonable suspicion, and that would greatly increase the numbers of innocents subjected to unreasonable border searches.

occur and safety precautions must be taken.[17] All state that the negative battery terminal must be disconnected to avoid an electrical spark that would start a fire, but only one warned to write down the car radio security code so the audio system, which could be extremely expensive, will work when the battery is reconnected.[18]

Most notably, we find that removal of the gas tank in a 1990-99 Volkswagen is anything but easy, and it involves removal and replacement of other vital parts of the car. Chilton states that the negative battery cable should be disconnected, the mechanic must be grounded to the car to avoid sparks, the back seat must be removed to get access to some of the tank bolts, the inner fender wall must be removed to disconnect the filler line, *the rear axle must be disconnected and lowered, including bleeding and disconnecting the hydraulic brake lines,* and the muffler disconnected.[19] That is anything but simple.

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[17] *See, e.g.*, Chilton, Saturn Coupes/Sedans/Wagons 1991-98 Repair Manual (1998), Ch. 5, p. 21 (18 steps).

[18] Chilton, Honda Civic/Del Sol 1996-00 Repair Manual (2001), Ch. 5, p. 11, step 1.

The radios of nearly all cars built within the last several years have built-in anti-theft programs. When the radio is reinstalled or the power disconnected and reconnected, the mechanic has to press the six channel keys in a certain sequence to activate the radio. An incorrect code can permanently disable the electronics in the radio to make it not worth stealing.

[19] Chilton, Volkswagen, Golf/Jetta/Cabriolet, 1990-99 Repair Manual (2000), Ch. 5, p. 12.

And, if one is cleaning a gas tank, Chilton recommends a professional mechanic must do the work.[20]

Even a nearly empty gas tank has gas fumes. Gas fumes explode. Therefore, gas tanks can explode during repairs. This is common sense.

On its website, Universal Underwriters, a fire insurer has an online newsletter *The Specialist* with an article on "How to avoid fire losses while servicing gasoline tanks." They write: "Service work on automotive gasoline tanks can result in significant property damage and employee injury if proper procedures and equipment aren't used. To the right are examples of such losses.[21] Don't let them happen at your dealership." It adds: "Note: only skilled employees who have been trained to safely work on or service gasoline tanks should be allowed to perform such work."[22] Just to be sure, they say it again: "The work should only be performed by employees with sufficient skill and training to carry out the operation in a safe manner."[23]

So, the Government wants the Court to believe that it is an "easy task" that can be done by anybody, but it is

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[20] Chilton, Chrysler LHS, etc., *supra*, § 6(2): "Cleaning the fuel tank (due to fuel contamination) should be performed by a professional with the proper training to carry out this critical and potentially dangerous work. Even after cleaning and flushing, explosive fumes may remain inside the fuel tank."

[21] The site lists examples of just five major garage fires from dropping a shop light which ignited fumes (one causing $729,000 damage) or fumes exploding from a pilot light. *See* the following note.

[22] http://www.universalunderwriters.com/uug/maintenance.nsf/0/F6A0CB83E821523F86256DD3006D983D?opendocument&changemenu=no.

[23] *Id.*

apparently oblivious to the obvious risks. To anyone who has ever spent any time in a garage, working on a gas tank is neither easy nor safe. Those of us who worked in fleet garages in college and law school are quite familiar with the risks of working on gas tanks. All of the Courts of Appeals to have viewed this issue, cited in Respondent's brief, have come to this realistic conclusion, and this Court should, too. Common sense should not take a back seat in constitutional adjudication.

The precautions are significant, because, once fumes ignite, there likely will be an explosion. If one is lucky, maybe it will just be a fire that can be put out with a fire extinguisher, which all the Chilton manuals, not to mention OSHA and all local fire safety codes, require be present. Add to this danger of fire and explosion the fact that the same Government prosecuting this case strongly suspects that gasoline is carcinogenic if it comes into contact with the skin or is inhaled[24] and requires that underground metal gasoline storage tanks are environmental hazards that must be removed and ground contamination cleaned up at great expense to the owners.[25] It is also common knowledge that several states, the first being California, require that gasoline pumps have devices

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[24] Because gasoline includes 150 different chemicals, overexposure to gasoline has been linked to breast cancer in men, and it can cause harmful effects to the central nervous system according to the Center for Disease Control. The jury is still out on the extent of the cancer risk, and the Environmental Protection Agency is still studying it. http://www.atsdr.cdc.gov/tfacts72.html.

[25] The Resource Conservation and Recovery Act of 1976, as amended (RCRA § 9004), 42 U.S.C. § 6991c, allows the U.S. Environmental Protection Agency to approve state underground storage tank programs to operate in the state in lieu of the federal underground storage tank program.

to reclaim gasoline fumes generated by the process of pumping and return them to the underground tank. Why? Gasoline fumes add to pollution.

Some gas tank parts must be replaced if removed for any reason; some cars require disassembling the brakes, bleeding the brake fluid out of a car, and dropping the rear axle, and all that *after* removing the rear seat to get to an access panel under it and removing the inner fender well to get to the filler line. How can it rationally be stated that this is "routine"? What if the contract mechanic fails to do his or her job correctly in reassembling the car or does not note that a particular car is one of those needing replacement parts? What if a $1,000 audio system self-destructs because the mechanic failed to note the security code? Who is responsible?

The best the Government can do is rely on four "shadetree mechanics" (not professional or certified mechanics) working at home on 30+ year old cars found from Google searches for its anecdotal, not professionally-guided, sources. Maybe it is easy on 30 year old cars where the owner is the mechanic cutting corners, but it is not easy today – it is inherently dangerous to the safety and health of the persons doing the work, including the Customs agents standing around watching, waiting for the gas tank to be dropped out so they can get right to it to hammer on the gas tank, as happened here. Br.U.S. at 3: "Inspector Pesayco hammered off bondo . . . from the top of the gas tank. That process took an additional 5 to 10 minutes." If Inspector Pesayco was using metal tools or was using metal tools on a metal tank,[26] there was a risk of

[26] This car was old enough that the tank would be metal.

fire or explosion. Thus, in their zeal to open the gas tank, the Customs agents put themselves, the contract mechanic, the garage of the Government, and the property of the target of the search and seizure all at unnecessary risk of fire while ferreting out crime.[27]

3. Technological Advances Make It Far Easier to Determine Reasonable Suspicion of Smuggling, and This Must Be Factored Into a Reasonableness Analysis.

Kyllo brought this Court face-to-face with a technological advance, thermal imaging, that made it possible to intrude into the expectation of privacy of a house. As this Court noted in *Garner,* 471 U.S. at 15, "changes in the legal and technological context" can distort common law meanings "almost beyond recognition when literally applied." Elementary technological changes already employed by the Government at the borders enable it to conduct intensive and quite revealing searches of vehicles without even touching them. Customs uses "mobile truck x-ray, buster density meter[s], and fiber optic scope[s]" to determine what is hidden. *US Customs Today*, January 2001,

[27] Which brings to mind Justice JACKSON's comment in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

http://www.cbp.gov/xp/CustomsToday/2001/January/custoday_hrm.xml. In June 1999, the Associated Press ran a story that was picked up nationwide: "High-Tech Detection Boosts War On Drugs."[28] The article speaks of a truck x-ray that can find drugs and illegal aliens in hidden compartments,[29] density meters[30] that can tell whether the wall of a compartment or a truck body has something hidden in it[31] (which is the subject of National Institute of Justice, *Guide to the Technologies of Concealed Weapon and Contraband Imaging and Detection,* NIJ Guide 602-00 (February 2001)[32]), and fiber optic scopes that can be inserted through the gas filler line to determine whether the gas tank has something other than gas in it.

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[28] http://www.mapinc.org/drugnews/v99.n592.a08.html and http://www.hemp.net/news/9906/14/high_tech_customs.shtml. One newspaper's version of this article was cited in Christopher E. Smith & Madhavi McCall, *Constitutional Rights and Technological Innovations in Criminal Justice*, 27 S. ILL. U. L. J. 103, 104 n. 9 (2002).

See http://www.msnbc.msn.com/Default.aspx?id=3070685&p1=0 (showing a picture of a dog sniffing a car while another Customs inspector uses a density meter on the left rear quarter panel, apparently from September 2003).

[29] It has even been on the Discovery Channel that trains are x-rayed at the border, too.

[30] One seller of portable density meters is Mettler Toledo, www.mt.com.

The White House Office of Drug Control Policy gives grants to police departments to buy density meters. *See, e.g.*, http://www.odessapd.com/k9.htm.

[31] Density meters have even made into movie scripts: http://www.stationfive.com/movies/Scripts/Mission_Impossible_2.txt.

[32] http://www.ncjrs.org/pdffiles1/nij/184432.pdf. Chapter 7, at 33-50, discusses the technology of density meters.

Density meters[33] and fiber optic scopes[34] have figured in numerous drug searches, only a few of which have been reported. And they can actually enhance privacy interests of the targets of searches and seizures, assuming the officer has justification for using one, by preventing needless destruction of property where the officer's suspicions are aroused. *See, e.g, United States v. Workcuff,* 250 F.Supp.2d 1160, 1181 (W.D.Mo. 2003) (density meter used on walls to avoid needless destruction of property during execution of a search warrant).

The Government had these tools available to it at this border crossing, but it seeks a vastly broader rule: one that permits an invasive search of a car with no pretense of suspicion, so invasive it would not be permitted even during an inventory search or a *Terry/Long* search of a car for weapons, all places where the Government also has a

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[33] *See, e.g., United States v. Hernandez*, 314 F.3d 430, 432 (9th Cir. 2002) (used on door of minivan), *amended and superseded*, 322 F.3d 592, 595 (9th Cir. 2003), *petition for cert. filed* (June 3, 2003; No. 02-11098); *State v. Garcia*, 2003 WL 22247450, *3 (Tenn. Oct. 1, 2003); *People v. Moya*, 2002 WL 31031780, *1, *2 n. 1 (Cal.App. 4th Dist. 2002) (unreported) (used by at random on cars in a parking lot near the Mexican border; constitutional issue of use of density meter not decided because of independent dog alert).

Counsel for Amicus can state as an officer of the Court that he reads police reports at least once a week where Arkansas State Police officers, particularly along I-40 near the Oklahoma border and around Little Rock, in a notoriously poor state, use density meters on vehicles when their suspicions are aroused. If the meter gives them more suspicion, they call for a drug dog.

[34] The following cases all involve searching gas tanks with fiber optic scopes: *United States v. Alcantar*, 271 F.3d 731, 735 (8th Cir. 2001); *United States v. Sanchez-Pena*, 2001 WL 685539, *1 (W.D. Tex. 2001); *United States v. Garcia*, 52 F.Supp.2d 1239, 1249 (D.Kan. 1999).

weighty interest. When basic technology overtakes the knowledge of the framers, we should look to that technology for the answer. That answer here is that manual removal of a gas tank without reasonable suspicion is unreasonable under the Fourth Amendment.

4. The Ready Availability of Far Less Intrusive Measures Makes This Search Unreasonable.

Amicus recognizes that this Court has held that the availability of "reasonable alternatives" or "less intrusive measures" is usually for law enforcement to decide and not for courts to second guess. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990) ("But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." (dealing with how sobriety checkpoints will be established)). But, in *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983), the Court made it clear that it did not foreclose the use of "less intrusive measures" in assessing reasonableness of a particular search:

> The reasonableness of any particular governmental activity *does not necessarily or invariably turn* on the existence of alternative "less intrusive" means. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), for example, we upheld the search of the trunk of a car to find a revolver suspected of being there. We rejected the contention that the public could equally well have been protected by the posting of a guard over the automobile. In language equally applicable to this case, we held, "[t]he fact that the protection of the public might, in the abstract, have been

> accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id.*, at 447. *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n. 12 (1976). We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse. It is evident that a stationhouse search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved. (emphasis added)

This case involves something much more than application of a less intrusive measure as to where and how a DWI roadblock will be established or whether a package will be inventoried in storage. Rather, it involves a far more serious intrusion into the liberty and freedom of movement of a motorist crossing the border while officers spend an hour or more taking the gas tank out of their car on a mere whim, if they so choose. This is a situation where the intensity of the search can readily and more easily be ameliorated by a readily available less intrusive measure that actually saves the government time, expense, and valuable manpower and protects the innocent motorist from unwarranted delays and intrusive searches in crossing the border when an officer decides to search a gas tank without suspicion.

Thus, the Court should look to Customs' own common use of its basic technology at the border which should be used to determine reasonable suspicion without granting the Government the wholesale right to disassemble any car it wants for any reason whatsoever, and that is exactly

the power the Government seeks. In the context of this case, the failure to use a common and less intrusive measure cuts to the heart of reasonableness of a search as a whole, and this is just the exception that *Lafayette* was looking to. Therefore, when balancing individual interests against governmental need, the scale tips decidedly toward individual interests because the magnitude of invasion of privacy and the greater length of detention of the individual. When this type of search occurs, reasonableness dictates that it be based on something more than merely presenting oneself at the border and the whim of the particular officer at that day and time.

Indeed, merely tapping on a gas tank with one's knuckle may provide reasonable suspicion, as it did here, but the Government wants its proposed suspicionless search rule, and nothing else. The Fourth Amendment, however, requires more from our Government, and it always has, from the seizure of John Hancock's *Liberty* to the Customs statutes of 1789 and 1790 to today.

Therefore, this search is clearly "non-routine" and it must be subject to the reasonable suspicion standard.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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